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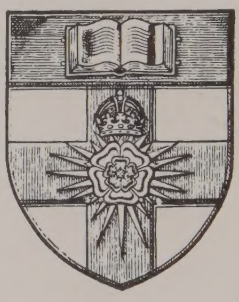

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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

EDITED BY

HERMAN COHEN.

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BUCKNILL, AND MR. JUSTICE BRAY

JOHN LYONS.

Severity of sentence.

1912
24 *June.*

This was an appeal against conviction and sentence, by leave of the full Court. Appellant was convicted at the Central Criminal Court on the 16th May, 1912, before the Recorder, of assault with intent to rob, and was sentenced to twelve months' imprisonment with hard labour.

M. Shearman, junior, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted with a man named Mackintosh. The prosecutor was a sailor, who on the 23rd April, at 5.40 a.m., came out of a common lodging house at the corner of Flower and Dean Street, counting some money; as he did so he passed two men sitting on a doorstep; he alleges that these were Mackintosh and the appellant, that the former tried to rob him, that he ran away pursued by both men and complained to the police. At 9 a.m. he passed the same place and saw the two prisoners sitting on a doorstep, and the appellant asked him to stand him a drink; he agreed, and they went into the "Bell" public-house together, but Mackintosh made some excuse for not accompanying them; later, however, he returned, accompanied by two men, with the result that the barman warned the prosecutor to leave; he did so, and had the two prisoners arrested. Leave has been given to call two witnesses.

P.-C. Percival Couldrey was called, and stated he went on duty at 6 a.m. on the 23rd April, and at that hour saw the

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24 *June.*

JOHN LYONS.

Darling J.
Bucknill J.
Bray J.

appellant opposite the "Bell" public-house, who said "Good morning" to him. Mackintosh was not there.

P.-C. John Shapland was called, and stated he was on duty in the neighbourhood from 10 p.m. of the 22nd April until 6 a.m. the next morning; he knew the appellant, but did not see him; he was 200 yards away at 5.40.

As Mackintosh has not appealed it must be assumed he was guilty, but the identification of the appellant by the prosecutor must be regarded with suspicion; the prosecutor can have had little opportunity of observing a man who was pursuing him; the jury were not warned of this in the summing up, as they should have been. The fact that twenty minutes after the assault the appellant was in the place where it took place, and that he called a policeman's attention to his presence there, points to his innocence. If the conviction is to stand the sentence is too severe.

W. J. L. Ambrose for the Crown. The question of identification was not raised before the magistrate or at the trial; the appellant did not cross-examine the prosecutor on the point, so there was no need to give the further evidence regarding it which might have been given. On arrest he not only said that he had never seen the prosecutor, but also said that Mackintosh was innocent. The appellant did not give evidence at the trial, although Mackintosh did.

BUCKNILL J.: The appellant in this case appeals against his conviction and sentence. In our opinion there is no substance in the point as to misdirection; the summing up seems quite correct. The case stood in this way. The prosecutor, a sailor, was coming out of a lodging-house counting his money, close to where Mackintosh was sitting. Mackintosh jumped at the prosecutor, who managed to get free and to run away, pursued by Mackintosh and another man, who, he alleges, was the appellant. Mackintosh must be taken to be guilty; he was convicted by the jury, and has not appealed. The prosecutor was believed by the jury, but the appellant denies that he was there at all. It is said on behalf of the Crown that the question of identification was not raised by the magistrate. We think it was. The

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24 *June.*

JOHN LYONS.

Bucknill J.

case was fairly left to the jury, and we cannot say they were wrong in believing the prosecutor. It must not be forgotten that the appellant denied that Mackintosh was guilty, which is a strong circumstance against him.

As to the sentence, we think it might be altered. Mackintosh was the prime mover; the appellant only ran after the prosecutor. As he did but little as compared with Mackintosh, we think the Recorder might have made a difference in their sentences. In our opinion the proper sentence for the appellant is one of six months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

A. L. B. T.

HARRY WHITE.

Absence of deliberation in the commission of a crime may mitigate severity of sentence.

This was an appeal against sentence by leave of the full Court. Appellant was convicted at the Essex Sessions on the 22nd May, 1912, of larceny, and was sentenced to two years' imprisonment with hard labour.

Appellant, who was not present, was not represented by counsel.

E. H. Tindal Atkinson for the Crown.

DARLING J.: The appellant was sentenced to two years' imprisonment with hard labour by the Chairman of the Essex Quarter Sessions for stealing a bicycle. He hired a bicycle from a man who wanted security; he therefore borrowed another bicycle from the prosecutor, and he left it as security; he brought back the hired bicycle, and was given that of the prosecutor, which he shortly afterwards sold. He was clearly guilty of stealing the bicycle, but the circumstances in which he did it were very peculiar; he seems to us not to have been from the beginning intentionally dishonest. A sentence of twe years' imprisonment with hard labour is very severe; judges only impose it for very

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24 *June.*

HARRY WHITE.

Darling J.

grave offences, because it is known that day for day it is harder than a similar period in a sentence of penal servitude. The appellant has a bad record; he has been convicted four times since 1907; he was rescued at one time by the Salvation Army, and apparently behaved decently for a short time. The Chairman has written us a report in which he says that the appellant may have been overcome by sudden temptation, and possibly he should have taken this circumstance into consideration in fixing the sentence. We think that the want of deliberation should have been taken into consideration, and for that reason the Court reduces the sentence to one of twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

A. L. B T.

JOSEPH CORRIGAN.

A misstatement in the summing up likely to influence the jury is a ground for quashing a conviction.

This was an appeal against conviction, by leave of Scrutton J. Appellant was convicted at the Liverpool City Sessions on the 3rd June, 1912, of housebreaking and larceny, and was sentenced to twelve months' imprisonment with hard labour.

J. W. Scott for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was charged in respect of an umbrella, and one or two garments, which, with other articles, had been stolen from the house of Thomas Kennah. His explanation was that he had bought them from a man on two occasions; some of the goods he said he had bought from him in a lodging-house, and some at a public-house. The Recorder, in his summing up, said that the appellant's story was that he had bought them from two different men, and laid stress on such an amazing coincidence. Further, he told the jury that no explanation had been given by the appellant at the police-court, whereas he had told the story to the policeman on his arrest. (He was stopped by the Court.)

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24 *June.*

JOSEPH CORRIGAN.

Darling J.
Bucknill J.
Bray J.

R. E. Whiteley for the Crown. Although there was a slight inaccuracy in the summing up, the jury must have convicted if the summing up had been accurate, and there has been no miscarriage of justice within the meaning of the Criminal Appeal Act. There is still a coincidence, for evidence was given that he sold knives and forks which were stolen from Kennah's house to a Mr. Hart, and the appellant gave no explanation as to how he became possessed of them.

DARLING J.: In this case a burglary had been committed, and shortly afterwards the appellant was found in possession of an umbrella, a singlet and a pair of drawers, part of the stolen property. He was charged with the housebreaking and with feloniously receiving the stolen property, and was convicted of the housebreaking. There is no evidence of this unless the fact that he had the stolen goods is such evidence, but this is a violent assumption, for burglars commonly only steal goods in order to dispose of them; it may well be that he got them from the thief. Besides these goods, it is said that he was in possession of knives and forks which were also stolen from the house, and that he sold them to a Mr. Hart, who bought them quite honestly. Hart was shewn several men at the police-station, and picked out a man who was not the prisoner as the man who sold him the knives and forks, but at the trial he said he was sure it was the appellant. We are of the opinion that if the case had been limited to the things sold to Hart no jury would have convicted the appellant, so that may be put aside.

As to the other goods, the appellant said he was staying at a common lodging-house, and no evidence was given that this was false. He said there was another man there whom he did not know, but whom he would know if he saw him again; that he bought one lot of him in a public-house, and another lot in the lodging-house. He always maintained that he bought them all from the same man, but the Recorder mistook his statements, and thought he said he bought them from two different men. On this mistake he summed up, and out of it he made a point so strong that the Court thinks that the jury could hardly have avoided convicting the appellant. He said, "The singlet and drawers are traced to the possession of the prisoner. He says he bought those from a man in a common lodging-house. The

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24 *June*
JOSEPH CORRIGAN.
Darling J.

hat and umbrella, which also, by what would certainly be, if the prisoner was innocent, a most amazing coincidence, the other part of the stolen property, reaches his possession through another hand." That is wrong. "That is to say, two people being in possession of it, by an amazing coincidence both sell this property to him, and you have this extraordinary coincidence that there being three lots of stolen property, one of them Ernest Hart thinks the prisoner sold to him, another one he is in possession of through a man in a common lodging-house, who is not here, and the third part he is in possession of through a man in a public-house, who is not here." The Recorder developes this again; he adds, "If this amazing coincidence is a little too much for your credulity, and you think that, as a matter of fact, he has not given a satisfactory explanation of this property obviously stolen a short time before, it will be your duty to convict. . . . I am bound to tell you the story put before you by the prisoner does suggest a most amazing coincidence; that he should have been the recipient of this property from two sources." It appears to the Court that the misapprehension under which the Recorder was labouring was made by him so strong an argument that the jury could not be expected to acquit the appellant, and they were led altogether away from the actual statement made by him.

The Recorder made another mistake; he said, "I am also bound to draw your attention to the fact that when charged before the magistrates, when he could have given that explanation how he got the property, he gave no explanation at all." As a matter of fact the police had given evidence that on arrest he said, "I got them from a man in a lodging-house in Everton Brow, where I was staying in the name of Correen." It is clear that this again was a misstatement by the Recorder, and that the appellant set up his defence as soon as he was taken into custody. It may be that he did receive the property knowing it to have been stolen, but he is entitled to have it proved. We think there was a misdirection by the Recorder in misstating the facts repeatedly, but we have to consider whether, notwithstanding this, we should dismiss the appeal under the provision in the statute. We have come to the conclusion that the point raised in the appeal must be decided in favour of the appellant, and we cannot say there has been no miscarriage of justice.

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24 *June.*

JOSEPH CORRIGAN.

Darling J.

We cannot feel certain that his explanation was not true; there certainly was not an amazing coincidence, as the Recorder thought; the jury might have accepted the explanation, or if unable to decide whether the story was true or not the appellant would have been entitled to an acquittal. We cannot come to the conclusion that the jury would not have acquitted him, and therefore the conviction cannot stand.

Conviction quashed.

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE CHANNELL, AND MR. JUSTICE PICKFORD.

1912
15 *July*.

JOHN MOWBRAY.

Murder.—It is for the jury to find, on a proper direction, whether defendant is so drunk as to be incapable of forming the intention of committing a crime. If a judge makes a misstatement in summing up counsel may interrupt to correct him.

This was an application for leave to appeal against conviction and to call further evidence. The appellant was convicted at Derby Assizes on the 25th June, 1912, before Lord Coleridge J., of the murder of Alfred Johnson, and was sentenced to death.

E. L. Hadfield for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was walking near Park Street, Chesterfield, soon after 1 a.m. on the 19th May, 1912, when he came upon Johnson and a policeman named Burns talking to one another. Burns flashed his light into appellant's face, and, according to appellant, hit him on the ear, whereupon he swore at Burns and went off to his lodgings in the same street. Shortly afterwards he came out again with a loaded gun and let it off and hit Johnson. Burns, who had gone away by then, heard the shot and returned to find Johnson lying dead in the road. Appellant was subsequently arrested and charged with murder.

The defence at the trial was that appellant was so drunk as to be incapable of forming an intention to kill, and that for this reason and also on account of the provocation the offence was reduced to manslaughter. The judge in summing up misdirected the jury on a fact material to the question of premeditation. Referring to the fact that about 7 o'clock in the evening before the crime was committed, appellant had bought some

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15 *July*.

JOHN MOWBRAY.

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Pickford J.

ammunition for the gun, the judge said as follows: "It is relevant to the case, putting the facts together, what you think of that purchase. Prisoner did not own a gun. He lodged in the house of a woman who had a son who had a gun. That gun he had seen, for it had been used in sport by the young man Oswald playing at soldiers, but so far as I have heard, and the evidence seems to be so, that gun was never loaded, was never used, and was never discharged." This was a misdirection, because the gun had in fact been used and discharged before. A witness could have been called to prove that at the trial.

[DARLING J.: If the judge misstated the evidence in his summing up, and you knew that it was a misstatement, you ought to have interrupted him at the time. But where is the misstatement here? It is true that as far as the judge had heard, the gun never had been used before.]

There was no positive evidence that it had never been used before, and I did not think it necessary to call the witness who could prove that it had been used. But as the judge misstated the fact to the jury, I ask leave to call that witness now.

Sir W. Ryland Adkins and *Drysdale Woodcock*, for the Crown, were not called upon.

DARLING J.: In this case the appellant applies for leave to appeal against a conviction of murder. Johnson, the murdered man, had been in the company of a policeman called Burns at the time when the appellant passed by, and the appellant, for some reason or other, then used violent language to Burns. Shortly afterwards Burns and Johnson separated, and a little later the appellant killed Johnson by shooting him with a gun which he had gone back to his house to fetch. Johnson's heart was absolutely destroyed, and other vital organs were blown to pieces. The defence was that the appellant was so drunk as to be incapable of forming an intention to murder, and this was the question before the jury. There was evidence that the appellant went home after killing Johnson and said that he had killed the wrong man; there was ample evidence, therefore, to support a finding that the appellant intended to kill someone.

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15 *July.*

JOHN MOWBRAY.

Darling J.

The judge directed the jury quite properly both as to the law and as to the evidence upon the question whether the drunkenness and the provocation were sufficient to reduce the crime to manslaughter, but the jury found the prisoner guilty of murder. In our opinion there is no sort of reason for saying that the conviction was wrong or that the sentence was wrong, and the appeal must be dismissed.

Application dismissed.

A. E. A. N.

JAMES BENNETT.

The Court will quash a conviction if it is of opinion that it is not justified by the evidence, even though it believes that the verdict was correct.

This was an appeal against conviction and sentence, by leave of Bray J. Appellant was convicted on the 13th June, 1912, at the Central Criminal Court, before Bankes J., of riot, and was sentenced to two years' detention in a Borstal institution.

Adrian Clark for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted with Jenkins and two others for being concerned in a riot of about twenty youths on the 27th April, 1912, in the course of which Harry Silvester was shot at and wounded. Appellant was also indicted with Jenkins for shooting at Silvester with intent to do him grievous bodily harm. Upon this charge, which was tried first, Jenkins was convicted, and appellant, by direction of the judge, was acquitted. My submission is that in the trial of the riot, there was no evidence whatever that appellant took any part in the riot. He was unarmed, and no witness saw him take any active part in it. In his own statement he admitted that he was in the music-hall where the others were, and when he came out he walked down Church Street, Shoreditch, where the others also went. His words were, "we went along Church Street." The judge and jury thought that he went there with Jenkins and the others, but he did not mean to say that, and he denied that it was so. There was nothing in his statement inconsistent with his being merely an innocent spectator.

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15 *July.*

JAMES BENNETT.

Darling J.
Channell J.
Pickford J.

A. H. Bodkin for the Crown. Appellant at first said that he was at home all night, but afterwards admitted that he was at the music-hall. The jury were no doubt also influenced by his conduct at the trial, for he asked no questions and did not go into the witness-box. Jenkins had stated that appellant was with him in Church Street. Appellant called him to contradict that statement, which he did; but the jury may not have believed him, and in cross-examination he bore out the theory of the prosecution that these youths went about in gangs. After verdict it was stated that appellant told the magistrate that he had got rid of his revolver a short time before, but this the prosecution did not know before verdict, and it was, therefore, not given in evidence.

CHANNELL J.: This is a case in which the Court feels a great difficulty in knowing what to do. We all strongly suspect that this verdict was right, but our suspicion is partly based on statements made after the verdict was given. The question is whether there was sufficient evidence upon which the jury ought to have come to the conclusion that the appellant was a party to the riot. We cannot say that the judge was wrong in leaving it to the jury. In cases near the line, that is perhaps the better thing to do. But on reflection we have come to the conclusion that there was really no evidence against the appellant. He admitted being present in the music-hall where Jenkins and Silvester were, but he might have been there merely as a spectator. Therefore either this case ought not to have been left to the jury, or else it is not a case in which the jury ought to have found the prisoner guilty. In our opinion the jury gave a correct guess, but it was only a guess, and not based upon evidence. It comes, therefore, within the words of s. 4 (1) of the Criminal Appeal Act, "verdict unreasonable . . . or cannot be supported having regard to the evidence," and the conviction must be quashed.

Conviction quashed.

A. E. A. N.

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WILLIAM JILLSON.

Severity of sentence.

This was an appeal against sentence, by leave of Bray J., and an application for leave to appeal against conviction. The appellant was convicted at Monmouth Assizes on the 21st June, 1912, before Phillimore J., of having carnal knowledge of a girl under thirteen, and was sentenced to ten years' penal servitude.

Appellant was not present and was not represented.

A. S. Comyns Carr, for the Crown, referred the Court to the doctor's evidence.

DARLING J.: The appellant was properly convicted of having connection with a girl under thirteen. It was a very bad case, and deserves a severe punishment. It is not necessary to discuss the details of the case here, which are of an unsavoury nature, but we have considered them very carefully, and we think that, having regard to all the circumstances, the right punishment is seven years' penal servitude, and the appeal is therefore allowed to that extent.

Sentence reduced.

A. E. A. N.

JAMES KEANE AND DAVID WATSON.

On the charge of being a habitual criminal, it is not a conclusive defence that defendant has done honest work since his last release; it is for the jury to determine on all the facts of the most recent offence proved against him, whether he was, at the time of its commission, "leading persistently a dishonest or criminal life."

These were appeals against sentence and applications for leave to appeal against conviction. Each of the appellants was convicted at London Sessions before the Deputy-Chairman on the 14th June, 1912, as a habitual criminal, and was sentenced to three years' penal servitude and to five years' preventive detention.

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W. Marsh for the appellants (under s. 10 of the Criminal Appeal Act), who were present. The appellants were arrested on a charge of housebreaking and stealing on the 24th May, 1912, to which charge they pleaded guilty. Thereupon each of them was tried as a habitual criminal and was found guilty by the jury. My submission is that there was no evidence that they were persistently leading a dishonest or criminal life. The last sentence in the case of Keane was one of five years' penal servitude for shopbreaking, and he was released on the 13th November, 1911; Watson's last sentence was four years' penal servitude for housebreaking, and he was released on the 23rd November, 1911. It has been laid down that some additional evidence beyond the three previous convictions is necessary to prove that at the time of the offence with which he is charged the prisoner was persistently leading a criminal or dishonest life. *Baggott,* 4 Cr. App. R. 67; 74 J. P. 213; 26 T. L. R. 266 (1910); *Condon,* 4 Cr. App. R. 109 (1910). There was no such evidence in this case. On the contrary all the additional evidence was in their favour. Six months had elapsed since they were released from prison, during which time Watson did nearly five months' honest work, repairing boots in his father's house up till the first week in April, and Keane got a barrow and sold fruit for periods amounting to two months, and made every effort to work during the rest of the time.

R. V. Wynne, for the Crown, was not called upon.

CHANNELL J.: These appellants were jointly indicted for housebreaking and stealing, and pleaded guilty, and they are now appealing against their convictions as habitual criminals. Their previous convictions were for crimes of a similar nature, and they came out of prison within ten days of one another about six months before committing the crime to which they have pleaded guilty. There was evidence that in the interval each of them had done a certain amount of honest work, the one more than the other, and in some cases no doubt such evidence has been held to shew that the prisoner was not a habitual criminal within the Prevention of Crime Act. But it has often been pointed out in this Court—I have done so myself at least twice—that the mere fact that the prisoner has done some honest work

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since his last release is by no means conclusive proof that he is not a habitual criminal. The point is whether, at the time when he commits the offence then being dealt with, he *is* leading persistently a dishonest or criminal life. The verb is in the present tense. If he has done some honest work but has given it up and committed another crime, it may well be that he has returned to a life of crime and is then a habitual criminal, and the nature of the most recent crime may itself be evidence that at the time he commits it he is persistently leading a dishonest or criminal life. In *Baggott's* case, which was relied on for the appellants but is really an authority against them, the offence of coining was given as an illustration of such a crime. But the present case is another illustration which will do equally well. The appellants, who must have planned the crime together, broke into this dwelling-house by means of a jemmy and stole bracelets and rings and other property from the bedrooms. We think that when they were committing this offence, they must then have been leading persistently a dishonest and criminal life. In our opinion, therefore, there was sufficient evidence to support the verdicts of the jury, and each of these appeals must be dismissed.

Appeals dismissed.

A. E. A. N.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHANNELL, AND MR. JUSTICE PHILLIMORE.

THOMAS WHITTY EVANS.

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If necessary, the Court will order documents that ought to have been forthcoming at the trial to be produced.

This was an application for leave to appeal against conviction and sentence. Appellant was convicted on the 13th June, 1912, at the Central Criminal Court, before the Recorder, of housebreaking, and was sentenced to three years' penal servitude. The application was before the Court on the 15th July, 1912, when it was adjourned in order that the Court might have information as to the date on which certain tramway tickets were issued.

G. St. John Macdonald for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The housebreaking was committed on the 9th May, about 4 p.m., at a house in Clapham. The appellant tried to prove an *alibi*, but was unsuccessful mainly on account of two tram tickets from Waterloo Bridge to the "Plough," Clapham, which were found in his house. It was alleged that these tickets were issued about 2 p.m. on the 9th May, but when the conductor at the trial produced the waybill to prove this, it was found to be dated the 9th April, the date being in the form 9.4.12. The conductor said he had dated this and other waybills wrongly, and the case was adjourned last week in order that evidence on this point might be before the Court. Defendant said the tickets had been left at his house by someone. I understand that that evidence has now been procured, and is not in the appellant's favour. There was, however, other evidence as to the *alibi* which should be accepted. Further, the sentence was too severe; see *Mountford*,

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4 Cr. App. R. 224 (1910), where the sentence was reduced, although the appellant had been convicted fourteen times for similar offences.

CHANNELL J.: This case was before the Court last week and stood over in order that the Court might see further documents. A waybill had been found to be dated 9.4.12 instead of 9th May, the day on which it was said to have been used. The conductor said that he had dated all his early documents in May wrongly, but when he came to tell the story at the trial he foolishly brought only the one document, and not the file of documents which would have proved or disproved his story. The appeal was adjourned, and the registrar applied to the tramway company for the documents. They are now here, and shew conclusively that there was a mistake, and that the real date of the waybill was the 9th May. The prisoner himself, therefore, must have known that his story was untrue. Even if it had been found that a mistake had occurred, the Court last week did not think that it ought to interfere, but it was felt that it would be more satisfactory if the documents were seen. The Court, which is differently constituted to-day, is strongly of the opinion that there is no ground for interfering, and therefore five judges are all of that opinion. The identification was particularly good; the witness had a conversation with the appellant as he came out of the house, and identified him the next day. There was an attempt to say there had been a conspiracy between the witness and the police, but for that there was no justification whatever. Evidence of an *alibi* was given by a woman on whose earnings as a prostitute the appellant had been convicted of living, and also by a man who was in receipt of an old age pension, which it is said he would not be likely to jeopardise by giving false evidence. His evidence turned on a pawn-ticket, but that he saw the appellant, and at what time it was, depends absolutely on his own statement.

As to the sentence, it is no argument to quote other cases where a sentence has been reduced, and the case of *Mountford* is of no assistance. In that case a trifling article had been stolen; here there was a serious theft. The application must be dismissed.

Application dismissed.

A. L. B. T.

JOHN LONG.

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Where there has been a conviction after grave irregularity at the trial not discovered for some time, the Court will quash the conviction without regard to the merits of the case.

This was an appeal against conviction and sentence, by leave of Channell J. Appellant was convicted on the 25th June, 1912, at the County of London Sessions, of feloniously receiving stolen property, and was sentenced to three years' penal servitude.

Tristram Beresford for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

Cancellor for the Crown: A serious mistake seems to have occurred in this trial. There were two indictments against appellant—the first with reference to twenty-three baskets of strawberries, the property in which was laid in the London and South Western Railway by a first count, and in a man named Wooderson by a second count, and the second indictment with reference to ten baskets of strawberries, the property in which was laid by different counts in the London and South Western Railway and Messrs. Ridley and Houlding. The prisoner was given in charge of the jury on the second indictment, but I opened, and he was tried on the first indictment. This mistake has only quite recently come to my knowledge, and no one noticed it at the trial; this may be accounted for by the fact that under the Prevention of Crimes Act, 1871, I called evidence with regard to the facts dealt with in the second indictment to prove guilty knowledge.

The Lord Chief Justice: In this case the appellant was convicted of feloniously receiving stolen property, and was sentenced to three years' penal servitude. Counsel for the Crown has now pointed out to the Court that he opened the facts, which were possibly somewhat similar in both indictments, and the prisoner was tried on the indictment on which the prisoner had not been put in charge of the jury. Some question might arise on the merits, but probably it is better that we should not express an opinion as to this, since, having regard to the mistake that occurred in the trial, the conviction must be quashed as having

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been irregular. We feel some doubt whether the appellant should be tried on the other indictment, but we think it better, having regard to what has happened, that there should not be any further proceedings in respect of either of these indictments.

Conviction quashed.

A. L. B. T.

ROBERT WAKEMAN.

A refusal to return to the owner a thing bailed, may, if the intention be fraudulent, amount to larceny by a bailee.

This was an appeal against conviction, by leave of Channell J. Appellant was convicted at the Worcester County Sessions, on the 2nd July, 1912, of larceny, and was sentenced to four months imprisonment with hard labour.

Oscar Walker for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted under s. 3 of the Larceny Act, 1861, for larceny as a bailee. He was engaged in obtaining information for use in an action in which a Mr. Wright was concerned, and came to the Wrights' house in this connection and stayed the night. The next day he borrowed Mrs. Wright's bicycle, the subject of the charge, promising to return it the same evening; he was arrested two days later riding the bicycle on the highway, and at different times gave different explanations as to his possession of the bicycle, one story being that it had been lent to him, and that he was keeping it as security for costs owed to his firm by Wright, and another that Wright had given it to him at Philip Baker's office in a transaction concerned with the cashing of a cheque and the payment of a taxi-cab driver. I submitted that there was no case to go to the jury, but the Chairman ruled against me. My ground of appeal is that to justify a conviction the determination of the bailment must be an act equivalent to larceny; see *Jackson*, 9 Cox C. C. 505 (1864). In all the other cases under this section there has been an unequivocal act of conversion; the retention of the chattel and

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refusal to give it up were not sufficient. *Jackson* was relied on in *Weekes*, 10 Cox C. C. 224 (1866), and was quoted also in *Oxenham*, 46 L. J. M. C. 125; 35 L. T. 490; 13 Cox C. C. 349 (1876); C. C. R. The facts in this case are stronger than those in *Jackson*. The summing up may have misled the jury into thinking that, even if the first taking was lawful, there had been a second one which was unlawful, as to which there was no evidence.

The Hon. R. Coventry for the Crown: The evidence was that the prisoner borrowed the bicycle on a Sunday for a few hours, and on the Tuesday refused to return it; this was clearly conversion, and the only question was whether it was fraudulent. On this point the false and conflicting stories were material on which the jury could decide; when the prisoner gave evidence he strengthened the case for the Crown.

Walker: The mere fact that false stories were told on arrest is not enough to prove fraudulent intent. *Alfred Jones*, 4 Cr. App. R. 17; 74 J. P. 168; 26 T. L. R. 226 (1910).

CHANNELL J.: In this case the prisoner told so many stories, if the evidence of credible witnesses be accepted, that there is no wonder that the jury did not believe him. The facts which the jury must be taken to have found must be the facts proved by the prosecution, namely, that he came to the Wrights' house late one night in a taxi-cab, and was lent the bicycle the next morning to get home, saying he would return it by six o'clock. He did not bring it back, and on being asked by Mrs. Wright why he had not done so, he claimed to be entitled to hold the bicycle as security for some claim he had against her husband. If this claim was *bonâ fide* there was no fraud; if not it might be larceny. It is not necessary that the Court should express a definite opinion as to the case of *Jackson*. There is this difference in fact between the two cases, that the appellant did refuse to give the bicycle up, which was clearly an act of detention. If the case had stood on the evidence of Mrs. Wright and her father-in-law, there would hardly have been a case to leave to the jury, but a policeman was called to whom the appellant had told another story, different from that which he told to Mrs.

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Wright. This might be evidence to go to the jury that the refusal to return the bicycle was fraudulent. Then he said many things that were obvious lies; at least, the jury thought so. In the face of these contradictory stories, it is impossible for us to say that the jury might not find a fraudulent intention. The summing up was not as clear as it might have been, but the question was properly put to the jury. The jury must be taken to have come to the conclusion by reason of the many different stories he told, that the appellant did intend to deprive Mrs. Wright of the bicycle. There was a sufficiently positive act of detention to take the case out of the decision in *Jackson*, even if *Jackson* is binding on us, so the appeal fails.

Appeal dismissed.

A. L. B. T.

JOHN HENRY WILSON.
EDWARD MARSHALL.

It is a condition precedent of proving defendant to be a habitual criminal, that the statutory notice to him should specify all charges to be made against him on that allegation, and the fact that he makes no objection at the trial does not remedy the defect of such notice.

On such a trial evidence of the defendant's mode of life need not be confined to the period since his last release.

If it is intended to charge the defendant in respect of the whole of that period, it is desirable to allege it specifically.

Wilson's case was an appeal against sentence, and an application for leave to appeal against conviction as a habitual criminal. Appellant pleaded guilty at the Chester County Sessions on the 1st July, 1912, to obtaining money by false pretences and was convicted of being a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention.

T. E. Morris for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant pleaded guilty to three charges of obtaining money by false pretences, and was then tried on the issue of being a habitual criminal. The grounds in the notice served on the appellant under the Prevention of Crime Act, 1908, in addition to the three statutory convictions, were

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as follows: "(2) That having been discharged from prison on the 21st day of February, 1912, on the 27th day of April, 1912, you committed the crime for which you are now awaiting your trial. (3) That between the 29th September, 1901, and the 18th May, 1911, you were convicted on nine separate occasions of different criminal offences, and between those same dates you were sentenced on eight occasions to imprisonment with hard labour, and on one occasion to penal servitude, and that those punishments have not produced any reformatory effect on you." At the trial a detective, Sergeant Phillips, gave evidence that the appellant had in March and April obtained four different sums of money by false pretences, and had also attempted to obtain contributions for sufferers by the "Titanic" disaster by falsely representing himself as a clerk in the White Star Steamship Company; further, that a book of receipts, several of which were missing, was found on him on arrest, and an exercise book containing bogus names entered against them. None of this evidence was referred to in the notice, and therefore the appellant had no opportunity of meeting these charges; see *Fawcett*, 5 Cr. App. R. 115; 74 J. P. 444 (1910); *Moran*, 5 Cr. App. R. 219; 75 J. P. 110 (1910); *Maxfield*, 7 Cr. App. R. 230 (1912); and *Mitchell*, 28 T. L. R. 484; 7 Cr. App. R. 283 (1912). Further, the evidence of the detective was inadmissible as being only hearsay. The Chairman laid stress on this evidence in his summing up.

Austin Jones for the Crown: It is clear that if the evidence had been specified in the notice it was admissible under s. 10 (5) of the Prevention of Crime Act, and clause 3 of the notice stating that the sentences passed on the appellant had produced no reformatory effect was adequate justification for this evidence. This point was never raised at the trial.

THE LORD CHIEF JUSTICE: We understand that the case of *Edward Marshall* raises a similar point; we will therefore hear that appeal before giving judgment in this.

This was an appeal against sentence and against conviction for larceny on a point of law. There was also an application for leave to appeal against conviction as a habitual criminal. Appellant was convicted at the Central Criminal Court on the

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4th July, 1912, of larceny of twenty-six knives, and of being a habitual criminal, and was sentenced by Mr. Commissioner Rentoul, K.C., to three years' penal servitude and five years' preventive detention.

J. P. Oliver for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The ground of appeal in respect of the conviction for larceny is that the judge informed the jury that the appellant had been convicted thirteen times in twelve years. The appellant gave evidence that he had been selling knives for eight years, and was then asked by the judge whether he meant that he had been selling them regularly for the last eight years as an honest tradesman; this question put the appellant in a difficulty, as he had had a sentence of five years' penal servitude in 1906, and, I submit, should not have been asked. On the prisoner answering it in the affirmative, the judge gave the jury the information referred to, but the convictions were never properly proved.

As to the conviction as a habitual criminal, the notice to the appellant, after referring to the three statutory convictions, said: "(2) That you made no effort to obtain honest employment between the date of your last release from prison and that of your apprehension on the charge for which you now stand committed for trial. (3) That between the 7th day of July, 1891, and the 10th day of April, 1912, you have been almost continuously in prison for various offences. (4) That having been discharged from prison on the 10th day of April, 1912, you were on the 29th day of April, 1912, apprehended on the charge for which you now stand committed for trial. (5) That you are a professional thief." Evidence was given on the charge of being a habitual criminal that the appellant took a jemmy to a pawnbroker, that knives were missing from one shop soon after he had been in it, and that he ordered goods at another shop, that the assistant was suspicious, and after the appellant left checked the goods, but missed nothing, but that he afterwards identified as his a knife which was found on the appellant. None of this evidence was justified by the notice, and they were all matters of suspicion only.

W. B. Dalley, for the Crown, was called upon on the second

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point only. The knife in question formed the subject of a second (untried) indictment against the appellant; the jemmy was pawned between his last release from prison and his arrest, and was evidence that he was a professional thief.

The LORD CHIEF CHIEF JUSTICE: Wilson only appeals against his conviction as a habitual criminal. The statute says that a man is a habitual criminal if, since attaining the age of sixteen years, he has at least three times previously been convicted of a crime and is leading persistently a dishonest or criminal life. Then it is enacted that a charge of being a habitual criminal shall not be inserted in the indictment without the consent of the Director of Public Prosecutions, and unless not less than seven days' notice has been given to the proper officer of the Court by which the offender is to be tried, and to the offender, that it is intended to insert such a charge, and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge. Frequently the number of convictions and the rapidity with which they occur is enough to shew that he has reverted to criminal habits. The defence is constantly raised that he has done honest work; that may be evidence in his favour, but it is not infrequently accompanied by relapses into crime. The only matters specified in the notice in Wilson's case were as follows: (his lordship read the notice quoted above). Except the statement that the last offence was committed at the time specified, there is no reference to what the appellant had done during the two months since his last release from prison; there are no general words nor other grounds mentioned such as are often properly referred to in these notices. Therefore this particular notice is entirely silent as to the matters which were proved in regard to those two months. Really the substantial case made against Wilson was that, while he had obtained certain employment, he had also obtained various sums of money by false pretences, and had taken a receipt book when he left that employment and used it in these frauds. These matters were not treated as immaterial in the summing up; the jury were told that they were important parts of the case, and if the evidence was admissible it certainly was of importance. We have decided in several cases that notice must be given of the grounds upon which the prosecution intend to found the charge. In the opinion of

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the Court no reference was made in the notice to the appellant's conduct in these two months, and he ought to have had notice of these particular charges. It is no answer to say that at the trial he made no complaint that he had not received notice. It is a condition precedent to proof that the prisoner should have notice of the charges that he may be called upon to meet. There was, therefore, no justification for such detailed evidence. The objection that it was only evidence of repute is not relevant; that is expressly authorised by s. 10 (5) of the Prevention of Crime Act, 1908, but it is admitted by the Crown that such evidence must be justified.

At Wilson's trial the judgment of Avory J. in *Mitchell* was cited by the Chairman. He seems to have thought that it was suggested in that judgment that evidence may not be given of the prisoner's previous life. Avory J.'s observations had reference to that particular case, and it is clear that evidence as to the mode of life of the prisoner on the question whether he is leading persistently a dishonest or criminal life need not be confined to the period between his last release from prison and the commission of the offence for which he has just been tried. So in Wilson's case the conviction as a habitual criminal must be quashed, and his sentence will be three years' penal servitude, to run from the date of conviction.

In Marshall's case two points were raised; the first is an objection to his conviction for larceny based on certain questions put to him by the judge with reference to his previous convictions. We do not wish to express any approval of the case being taken out of the hands of the prosecuting counsel. It would have been better if the matter had been kept to a later stage. That Marshall could be cross-examined as to character is plain after his statement, and in fact he himself was quite willing to have his character gone into. In his case the fullest cross-examination as to his career was justified, so the conviction on the larceny indictment cannot be set aside on the ground that more was said at an early stage than might have been advisable.

With regard to the objection in this case to the conviction on the charge of being a habitual criminal, the notice was of a very different character from that in Wilson's case. (His lordship read the notice quoted above.) In the opinion of the Court that put the prisoner on warning that he was going to be charged with

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regard to all his life since his last release from prison, and that made admissible practically all that was proved against him. The most that can be said is that, if it was known what the evidence has now proved, it might have been put in more specifically, negativing the suggestion that he was trying to get on by doing honest work. The appeal in this case therefore fails.

Wilson's case—*Conviction as habitual criminal quashed.*

Marshall's case—*Appeal dismissed.*

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE AVORY.

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FREDERICK TAYLOR.

Sentence reduced in view of period of detention before trial.

This was an appeal against sentence, by leave of Channell J. Appellant was convicted at the Guildford Assizes on the 5th July, 1912, before the Lord Chief Justice, of carnal knowledge of a girl under sixteen years of age, and was sentenced to two years' imprisonment with hard labour.

Appellant in person. My sentence was too severe; I was four months in prison awaiting my trial.

A. S. Comyns Carr for the Crown.

The LORD CHIEF JUSTICE: This was a particularly bad case; it was proved that the appellant had carnal connection with two girls, both under the age of sixteen. One of them is pregnant in consequence. Though I imposed the maximum sentence, my brothers agree that it was not too much. I do not think it was called to my attention that the appellant had been four months in prison before trial; if it had been I should have allowed for that period. The sentence will be reduced to eighteen months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

A. L. B. T.

ALFRED ARTHUR AUSTIN.

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Darling J.
Avory J.

A dying declaration made at a moment when all hope of recovery has been abandoned is admissible in evidence, though later hope may revive in the declarant.

This was an appeal against conviction on a point of law. Appellant was convicted at the Birmingham Assizes on the 12th July, 1912, before Avory J., of manslaughter, and was sentenced to seven years' penal servitude.

Joy for the appellant, who was not present. The appellant was indicted with Alice Cake for the murder of Lena Kinmond by means of an illegal operation, and the jury found him guilty of manslaughter. The ground of my appeal is that a declaration by the deceased was admitted in evidence, although, I submit, the Crown failed to satisfy the onus of proof that it was made under the settled hopeless expectation of imminent death. I cannot say there was no evidence on the point, because there was the fact that the woman died about an hour and three-quarters after the statement was made, but it is, I submit, a question of mixed law and fact on which there is a right of appeal. On the 11th April the deceased was at a nursing home, and the doctors were preparing to perform an operation on her. When the preparations were completed it was found that her condition was much worse, and she was in fact dying. Dr. Heald said to her, "The operation cannot take place now." The word "now" is ambiguous, but it is clear from the interpretation put upon it by the deceased that her declaration was inadmissible. This is shewn by the evidence of a Mr. Maddocks, who saw her an hour after the declaration was made, and to whom she said, "Is it not rotten? they won't operate on me till to-morrow." It is clear from this that she had not given up all hope of recovery. Dr. Brown, who was also present when the operation was abandoned, said to her, "You are very much worse, and I am afraid you are dying," and it was at his suggestion that a magistrate was sent for, a course to which she consented. The judge said that what influenced his mind in admitting the declaration was the fact that she consented to a magistrate being sent for. This is only evidence that she appreciated that she might die, which falls

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short of the test laid down in *Perry*, [1909] 2 K. B. 697, at p. 703; 78 L. J. K. B. 1034; 101 L. T. 127; 73 J. P. 456; 53 S. J. 810; 25 T. L. R. 676; 2 Cr. App. R. 267. The learned judge had no right to take into account the nature of the statement itself with a view to deciding whether or not the declarant had abandoned hope, because the point which he had to decide was whether the statement was admissible or not, and for that purpose he could have no right to derive any assistance from the nature of the contents of the very statement the admissibility of which was under consideration. In *Gloster*, 16 Cox C. C. 471 (1888), the declaration was held to be inadmissible, although the patient there persisted that she was certain to die. The present case is a stronger one than that.

Sir Ryland Adkins and *H. B. Drysdale Woodcock*, for the Crown, were not called upon.

DARLING J.: The appellant was indicted on a charge of murder by means of an illegal operation, and was convicted of manslaughter. The appeal is based on the ground that Avory J. improperly admitted in evidence the dying declaration made by the deceased woman about an hour before her death, the submission being that the judge did not rightly interpret the law as to the admissibility of such evidence, and that in deciding that the evidence was admissible he acted where there was no proper evidence on which he could act. It seems to us that this was a simple case; it is not necessary for us to go through the evidence which has been read to us by Mr. Joy. The point is taken in the notice of appeal in this way: The doctor, in reply to a question by the deceased, "When is the operation going to be?" said, "The operation will not take place now; I am afraid you are too weak," and the effect of this upon the mind of the deceased is shown by what she said later, "Is it not rotten? they won't operate on me till to-morrow." Avory J. seems to the Court to have laid down the law with perfect accuracy. He referred to *Perry*, decided in this Court in 1909, and said, "The principle is this, to make such a statement admissible it must appear that it was made under the influence of a settled—that means one not wavering—hopeless—which means where hope is abandoned—expectation of death. And it must be an expectation of death

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not necessarily immediate, but within a short time. My own opinion is that the last qualification is not necessary because it is involved in the hopeless expectation under which alone a statement can be admitted. If a statement is made when all hope of life is abandoned it is immaterial whether the declarant anticipates death within an hour or within a day. The essence of the sanction which the law gives to such a statement is that when it was made all hope of life is abandoned." That is the true principle. It is not to the point to say that after the statement was made hope revived. The real question is whether, at the time the declarant made the statement, she was in hopeless expectation of death. If she was it is immaterial that after that her bodily and mental condition became better, and she cherished hopes of recovery. Having laid down the law in that way, Avory J. applied his mind to the evidence and, it seems to us, gave very good reasons for thinking the statement was admissible. He said, "Having regard to the nature of the case which we are now trying, and to the request or the acquiescence of the deceased in the magistrate being sent for, and sent for that he might record what she had to say, and to the statement made by the medical men to her which, I believe, produced in her mind the hopeless settled expectation that she would die, I, not without hesitation, have decided that this statement is admissible as a dying declaration." That being so, what had happened? The woman, after she had made the declaration, made use of the expression, "Is it not rotten? they won't operate on me until to-morrow." The judge was satisfied that that did not shew that at the time she made the declaration she had hopes of recovery. In *Perry* the Lord Chief Justice said, "We are of opinion that the right view is that in determining whether a declaration is admissible in evidence the judge at the trial ought to consider whether the death of the deceased was imminent at the time the declaration was made, and to determine from the language used by the deceased whether the statement was made at a time when the deceased had a settled hopeless expectation of death. . . . . By the expression 'hopeless expectation of death' I mean that the deceased had abandoned all hope of living." Avory J. considered the evidence as it is there laid down that he should. Many people abandon what they afterwards regain, and this is equally true as regards hope as it is of a chattel. In the opinion of the Court the judge construed

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the law rightly, and dealt with the facts as they should be dealt with; the appeal therefore fails.

Appeal dismissed.

Solicitor for the Appellant—*J. Hall-Wright*, Birmingham.

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If, after hearing fresh evidence, the Court is of opinion that it would not have prevented a conviction, the Court will not quash the conviction.

Reference by the Home Secretary. Appellant was convicted at the Oxford City Sessions on the 4th January, 1911, of obtaining money by false pretences, and was sentenced to three years' penal servitude.

Ernest P. Walsh for the appellant, who was present. This case comes before the Court on a reference by the Home Secretary under s. 19 of the Criminal Appeal Act. The appellant was convicted eighteen months ago, and a week later, on the 11th January, 1911, he addressed a petition to the Home Secretary protesting his innocence, and another one on the 2nd February, 1911. The Home Secretary declined to interfere, but on the 1st June, 1912, Frederick Barrett, a convict at Portland, sent to the Home Secretary a statement confessing his guilt, and exculpating the appellant. He states that the frauds were committed by himself with two others, by name Allen and Robinson. The Governor of Portland prison states that the appellant and Barrett have had no opportunity of communicating with each other, although they are both in that prison (Barrett being convicted of another crime).

The arrest of the appellant came about in this way. A man fell down dead in Oxford in October, 1910, and as it was not known who he was his finger-prints were taken and sent to Scotland Yard. They reported that he was a man named Allen, who had been convicted with the appellant, and as frauds had been committed in Oxford on tradesmen within the last few days, appellant's photograph was obtained, and after identification by the Oxford tradesmen, the appellant was arrested. The shorthand notes of the trial are, I understand, no longer in existence.

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Barrett is here, and prepared to give evidence. I defended prisoner from the dock.

Frederick Barrett stated that on the 21st October, 1910, he came to Oxford with Allen and Robinson with the intention of passing off worthless cheques; they stayed at Wolsey House in Oxford, he as Harris, Allen as Foster; Robinson came later, and pretended to have nothing to do with them. On the following day he purchased various articles with worthless cheques, posing as an undergraduate of Pembroke College. The appellant was not with them in Oxford, and had nothing to do with the frauds. Allen wrote out the cheques, and he endorsed them.

Cross-examined by *Harold Hardy* for the Crown. Robinson had the cheques; he did not know where he got them from. Allen and he wrote their names in the visitors' book at Wolsey House. Their only luggage was a bag containing a pair of boots and a pair of gaiters. He had never seen a card produced with the name of Nosworthy; he did not know if Robinson passed under that name. He had cards with the name Harris, and the address Roston House, Leyton; they were printed in Oxford. He did not know that a packet of the Nosworthy cards were in the bag. He had no ill-feeling against Robinson, but thought him a mean man. He had said in his confession: "If Robinson is as mean with his liberty as he is with his money, he will not endorse my statement." He was not in the Court at Oxford when the appellant was tried, he did not admit that to Inspector Trinder. He had seen the appellant once or twice only. When he first heard of the appellant's conviction he thought he also had been tampering with cheques, and those that he (the witness) passed had been wrongly included with the others. Later, a friend told him the whole case; he said nothing then as he did not want to lose his liberty. He was arrested on the 31st December, 1911, and first made a report when he got to Portland. He had had no communication with the appellant there.

By the Court: He knew the name of Nosworthy was going to be used at Oxford.

Walsh tendered the confession, and the Court ruled that, as it had been cross-examined upon, it was admissible, but it was not read.

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Richard Truman, otherwise *William Robinson,* called and examined by *Walsh.* He was sentenced in January, 1912, to three years' penal servitude for forgery. He had been to Oxford about two years ago; he travelled down alone and stayed at Cowley. He knew the appellant and Barrett. He saw Allen and Barrett at Oxford, meeting them by accident; Barrett mentioned that they were going to pass some cheques.

By the Court: He did not know Wolsey House, and did not know anyone called Nosworthy, and had not had cards printed in that name.

Miss Armstrong, called and examined by *Hardy,* stated that she carried on a boarding-house at Oxford called Wolsey House. On the 21st October, 1910, two men came there giving the names of Harris and Foster. Later another man came; he gave a card; the one produced with the name Nosworthy was the card. They all left without paying, leaving behind the bag produced, which she handed to Inspector Trinder. She identified Barrett as Harris; she was not sure about the appellant, but there was some resemblance to the man who gave her the card. She did not recognise Robinson.

Cross-examined by *Walsh.* She failed to identify the appellant at the Police Court in November, 1910. She was looking for the man she knew as Harris.

Inspector Trinder, examined by *Hardy,* said: He was given the bag by Miss Armstrong; it contained a pair of boots, a pair of leggings and a packet of cards bearing the name of Nosworthy. He saw Barrett at the appellant's trial, and he saw him on the 27th January, 1912; he then admitted having been present at the appellant's trial.

Cross-examined. He heard the Recorder comment on one Cook not being called; he could not say whether Cook and Barrett were the same man; he did not know that Cook was at the trial; he did not know George Cook.

By the Court: The appellant, before his trial, told him he could prove an *alibi* at Nottingham, and the witness went there to make enquiries. At the trial the appellant called evidence to prove that he was at Leeds on the date of the offence.

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Walsh: If the jury at the trial had heard the evidence which is now before the Court they would probably have acquitted the appellant. Barrett's story bears the impress of truth: if it is true it is clear that some of the shopmen identified the appellant as having been in their shops when in reality it was Barrett. It is true Robinson contradicts Barrett, but Barrett forecast this, and Robinson naturally does not wish to incriminate himself; he admits having been in Oxford at the time.

Hardy for the Crown. This was undoubtedly a case for enquiry. The appellant in his petitions suggested that he had been taken for Robinson; Barrett's evidence suggests that the appellant was mistaken for him. There is no reason why Robinson should not be believed. The appellant was identified by five witnesses at the trial, including the German waiter at Wolsey House; further, the appellant attempted to set up two different *alibis*, both of which broke down.

Walsh: The mistake about the *alibi* arose from the difficulty of fixing dates accurately; the appellant had been in both Nottingham and Leeds in October, 1910. There is no reason why Barrett should have told his story if it was not true.

The LORD CHIEF JUSTICE: In this case James Harris, otherwise Robert Desmond, appeals against his conviction. He was convicted on the 4th January, 1911, of obtaining money by false pretences, and sentenced to three years' penal servitude. The matter has now been referred to us by the Home Secretary, who has twice investigated it on petitions from the appellant, and declined to interfere. A subsequent confession by Barrett sent him by the governor of the prison has been forwarded to us, and we have now investigated the matter.

It is to be noted that the appellant did not appeal against his conviction; that is not conclusive, but had he done so the matter would have been investigated in January, 1911, when there would have been a better opportunity of arriving at the truth. Still, as he protests his innocence, it is proper that the case should be enquired into. Now, there are three men present, the appellant, Barrett, and a man who is suggested by Barrett as having been the third man engaged in the frauds. That three men were in

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Oxford on the 21st October, 1910, there is no doubt. Allen stayed at Wolsey House as Foster, Barrett, we also think, was at Wolsey House, and also the appellant. The men are before us in this Court, and we think it is almost impossible to suggest that there has been a mistake. Robinson is a man of remarkable appearance, and if he had been the third man, Miss Armstrong would have had no difficulty in identifying him. Of course, there is a better opportunity for her to identify a man who stayed in her house than one she might meet casually. At the trial the appellant was identified by four or five witnesses as having gone to their shops and as having come to Wolsey House on the Friday afternoon and left on the Saturday That this evidence was mistaken is not really suggested, apart from the fact that Miss Armstrong did not identify the appellant, and said very fairly that she could not, but that he was like the man who gave her the card, and that the two men who came first, Barrett and Allen, signed the book. We are satisfied by a comparison of the handwriting that Barrett wrote the name James Harris in the book, and also endorsed the cheques. The third man did not write his name in the book, but gave a card bearing the name of Nosworthy, and one of the cheques is signed in that name. There is no evidence before us that Robinson ever passed as Nosworthy, but Barrett does give some evidence that the man who went with him to Oxford was going to use that name in connection with the purchase of horses. Under the circumstances we have to consider, taking Barrett's evidence as given before us, whether it would have led the jury to come to a different conclusion. The point was put in that way quite properly by Mr. Walsh. Now, we cannot take that view. That part of Barrett's evidence is true, namely, that he was one of the three men, we have no doubt, but it does not follow that he was the only man who went into shops; it is very unlikely that only one man should have engaged in this part of the fraud who could have been traced from shop to shop. We do not believe Barrett's evidence that Robinson was the third man there and not the appellant. If Barrett was really the only man who went to the shops, or if it was only Barrett and Robinson, we cannot believe that the witnesses called within a few weeks of the occurrence would have been mistaken. It must not be forgotten that an *alibi* was set up at the trial on behalf of the appellant which the jury disbelieved. Two *alibis* were

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set up one after the other. We have not forgotten that Mr. Walsh suggested that this was caused by a mistake as to the date, but it is not consistent with the statements made by the appellant. If Barrett's story is to be believed as a whole, how came it to be told for the first time to the governor of the prison, months after conviction? Also it is very strange that, if the appellant had nothing to do with the frauds, and Barrett had no reason for having an interest in the trial, he should have been, as we believe he was, present at the trial. We believe the evidence of Inspector Trinder, who was severely cross-examined, quite properly, on this point, and that the fact was admitted by Barrett. We think that these frauds were attempted by three people, and we are not satisfied that the man who presented the card with the name of Nosworthy was not the appellant. On the cards printed in London, and on the card used by Barrett, is the same address—Roston House, Leyton, although spelt differently. In our opinion, assuming this evidence to have been given, the jury would have had to ask themselves the same question which we ask ourselves. The appellant having been identified as he was, would the evidence of a confederate such as Barrett have overweighed the direct testimony as to identity? Credit cannot be given to that part of Barrett's story which relates to his confederate having been Robinson and not the appellant. If he had gone into the box, had pleaded guilty to having been concerned in the frauds, and had said that the appellant was not in Oxford with him, in our opinion the jury would not have believed him. There is not sufficient evidence to justify us in setting aside the conviction and the verdict of the jury. The appeal must be dismissed, but the appellant need not lose any time by virtue of these proceedings.

The explanation given as to why no transcript of the trial is available is very unsatisfactory. The official shorthand writer is bound under the rules to keep the transcript. To suggest that within two years of the trial it should not be forthcoming is most unsatisfactory.

Appeal dismissed.

Solicitors for the Appellant—*J. Westcott and Sons.*

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE PHILLIMORE, AND MR. JUSTICE HAMILTON.

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JOSEPH STEPHENSON.

In an indictment for indecent assault of a child under thirteen years of age it is not necessary to aver the child's age (*a*).

This was an appeal against conviction on the certificate of the Chairman of the Glamorgan County Sessions. Appellant was convicted at those Sessions on the 4th July, 1912, of an indecent assault; sentence was postponed.

T. W. Langman for the appellant (under s. 10 of the Criminal Appeal Act), who had been granted bail. The appellant was first tried on an indictment charging him with an indecent assault on a girl who was over thirteen years of age, and he was acquitted. He was then tried on a second indictment charging him with a similar offence on a girl who was, in fact, under thirteen years of age, and an objection was then raised to the indictment on the ground that the girl's age was not stated in it. The Court was referred to Archbold's Criminal Pleadings, p. 1018 (24th ed.). "Where the assault is on a girl under thirteen, the fact that she is so should be stated in the indictment, because of 43 & 44 Vict. c. 45 (Criminal Law Amendment Act, 1880), s. 2; and because of the provisions as to presuming age in 8 Edw. 7, c. 67 (Children Act, 1908), s. 123 (2) and Sched. I." The Chairman said that as the words were "should be" and not "must be" he held that the indictment was good, but gave leave to appeal.

The Criminal Procedure Act, 1851, 14 & 15 Vict. c. 100, s. 24, enacts that "No indictment for any offence shall be held

(*a*) Cf. *Sarah Jones*, 6 Cr. App. R. 290 (1911).

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insufficient for want of the averment of any matter unnecessary to be proved," from which it follows that the indictment should contain all the essentials of the offence charged; the age was essential here since a new offence was constituted by the Criminal Law Amendment Act, 1880, s. 2.

[PHILLIMORE J.: In *Lock*, L. R. 2 C. C. R. 10; 42 L. J. M. C. 5; 27 L. T. 661; 21 W. R. 144; 12 Cox C. C. 244 (1872) the age was not stated in the indictment; it should have been if your argument is correct.]

In *Martin*, 9 C. & P. 213; 2 Moo. C. C. 123 (1840), the indictment (for indecent assault with intent to know carnally) was quashed owing to the fact that the girl's age was not stated. Age was mentioned in the statute.

[PHILLIMORE J.: In that case the statute made it a minor offence if the girl consented; age was therefore the gist of the offence.]

Here, though the age is not mentioned in the principal statute (1861) it is incorporated by that of 1880, which cannot be read apart. It was essential for the prosecution to negative consent by stating the age: see Archbold, p. 58. In analogous cases, *e.g.*, the Criminal Law Amendment Act, 1885, s. 4, age must be stated. The Children Act (above) gives an advantage to the prosecution by shifting an onus on to the defence in certain cases; it is, therefore, essential that age should be averred. Otherwise no advantage could be taken of this statute in the case of children of tender years.

A. S. Comyns Carr, for the Crown, was not called upon.

DARLING J.: In this case the appellant was indicted for unlawfully and indecently assaulting a girl named in the indictment. In fact, the girl was under thirteen years of age, so it would have been of no advantage to the appellant had he proved that the girl had consented. But it is said that the indictment is bad because the fact that the girl was under thirteen is not mentioned. Mr. Langman argues that (taken with s. 52 of the Offences against the Person Act, 1861) the Criminal Law Amendment Act, 1880, s. 2, creates a new offence when it says "It

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shall be no defence to a charge or an indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency." It appears to us that the Act does not constitute a new offence; it certainly deprives the defendant of what would have been a defence, but it does not appear any more necessary to state in the indictment that the prosecutrix is under thirteen than that she is over seventy. The age is in both cases immaterial as to the offence, though in one case it deprives the prisoner of a defence. With regard to the passage quoted from Archbold, that statement is right if by "should" is meant, by way of good drafting, if the prosecution want to gain an advantage, because the section (52 of the 1861 Act) under which this indictment was drawn is mentioned in the first schedule to 8 Edw. 7, c. 67, which by s. 123 (2) raises a presumption in favour of the age mentioned in the indictment. The prosecution, by omitting to aver the age in this case, deprived themselves of the advantage of this presumption, but consent still remains no defence if the age is proved to be under thirteen. It cannot be said here that this indictment is insufficient "for want of the averment of any matter" necessary to be proved. It is not necessary to prove that the girl was under thirteen in order that it might be a good verdict of "Guilty," nor has it been alleged that the appellant suffered any disadvantage or inconvenience by the absence of such an averment in the indictment. The recognizances will hold good, and the appellant must attend the next Sessions for sentence.

Appeal dismissed.

A. L. B. T.

ALBERT EDWARDS.

If the Court on hearing fresh evidence is of opinion that if it had been before the jury which convicted they might have acquitted, it will quash the conviction.

This was an appeal against conviction by leave of the full Court. Appellant was convicted at the Stafford Assizes on the 8th July, 1912, before Horridge J., of riot, and was sentenced to four months' imprisonment with hard labour.

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V. G. Milward for the appellant who had been granted bail, but was present. The appellant was tried with several other men for being concerned in the burning of a cabin during the coal strike on the 27th March, 1912; in the other cases the prisoners were identified by several witnesses, but the appellant was only identified by one man named Cooper, who said he asked him for a match, and that the appellant answered that he had used his last in setting fire to the cabin. The fire took place between 4.15 and 4.45 p.m., and the defence set up at the trial was an *alibi;* his sister gave evidence that the appellant was at Rugeley between 3.0 and 4.0 p.m.; Rugeley is about seven miles from the Littleton colliery where the riot occurred, and Hednesford is five miles from Rugeley, and about two from the colliery; the road between Rugeley and Hednesford has considerable undulations, and there is a big hill to the colliery from Hednesford. The appellant's story was that after leaving Rugeley he went to Hednesford, and two witnesses at the trial spoke to seeing him there at 5 p.m.; he got to the colliery at 5.20 after all the damage had been done. Horridge J., said there was a gap in the evidence between 4 and 5 p.m., in which time the appellant might have gone to the colliery and returned to Hednesford. I now have leave to call further evidence in support of the *alibi*.

William Tooth called and examined by *Milward,* stated:—I live at Rugeley and am superintendent of the Refuge Insurance Company. Appellant was one of our agents; his duty was to bring his reports and cash to me every Wednesday at 2.15. On the day of the riot he was late; he took the turn of another agent, Craddock, who was due at 2.45; he was with me quite twenty minutes; then he had a conversation with another agent, and left my office at about 3.30 p.m. It is a very hilly road from Rugeley to Hednesford.

Cross-examined by *A. S. Comyns Carr* for the Crown. It was past 3 p.m. when the appellant came; he took the second turn. I did not give evidence at the trial, because I wanted to keep out of it; I understood one of the other agents was going to give this evidence, otherwise I would have done so.

William Caddick stated: I live in Hednesford. On the day

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of the riot I was on a milk round with a float; I left the float at a farm, and was walking back to Hednesford; I saw appellant at the waterworks on the Rugeley Road; he was on a bicycle, but he dismounted and walked with me to Hednesford, about three and a half miles. At Hednesford we met Edwin Leach and Frank Davies. The men employed at Bumstead and Chandler's works were then just coming along Station Road. They leave the works at 5 p.m. I saw a cart pass us as we walked; I do not know who was in it.

Cross-examined: I was driving the same round every day then.

Ernest Goodwin stated: I am a butcher and live near Cannock. I attended a stock sale at Rugeley on the day of the riot. I left the sale about 4.10 p.m. in my horse and trap. I passed appellant and Caddick near the pumping station at about 4.30 p.m. Appellant was wheeling his bicycle.

Cross-examined: I attend sales at Rugeley every fortnight. I fix the date because it was a special sale of Lord Anglesea's stock.

Mrs. Mary Leach stated: I live at Hednesford. On the day of the riot I was looking out of my window and I noticed a train go by at about 4.45 p.m., and at the same time I saw appellant and Caddick go by, the former wheeling a bicycle. I called out to him.

Cross-examined: Appellant went by every Wednesday: he was later than usual on this day. The train was the North Staffordshire passenger train going to Hednesford. It is due about 4.45 p.m.

Edward Thomas Purslow stated: I am in the employ of the Cannock Education Authority. On the day of the riot I was going home at about 5 p.m. I passed Jarvis and Ingram. I had heard of the riot then. Appellant passed me coming from Rugeley; he was pushing a bicycle.

Albert Ingram stated: On the day of the riot I was in Hednesford. I saw appellant talking to Leach and Davies; he had a bicycle. The men had just come out of Bumstead's Foundry.

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Charles Jarvis stated: I remember the day of the riot, I saw ingram in Hednesford at about 5 p.m. I talked to appellant between 4.45 and 5 p.m. I saw Leach, Davies and Caddick there. Purslow came along about five minutes later.

William Garbett stated: I am a miner; I was at the colliery during the riot. I saw appellant there at about 5.30 p.m.; I don't know where he came from; he had his bicycle; it would have been impossible to push the bicycle through the crowd that was on the pit bank.

Arthur Cooper, called at the request of the Court, and examined by Darling J., stated: I am a miner and was on strike at the time of the riot. I saw appellant assisting to smash the cabin. I asked him for a match; he answered "I struck the last match lighting that." I have never had a dispute with appellant; I am confident it was he; I have no idea at what time I saw him, or when I got to the colliery.

Cross-examined by *Milward:* I have never seen appellant smoke; I don't know that he doesn't smoke. After the hearing before the magistrates I went to the Bolt Inn; I did not say there that I wanted to get Edwards five years because he had too much swank upon him.

Milward: If this evidence had been before the jury at the trial they would not have accepted Cooper's evidence against such a mass of independent evidence.

A. S. Comyns Carr for the Crown. The bulk of the witnesses heard to-day do not carry the matter further than Leach and Davies, who Horridge J. said might well be speaking the truth, and whom the jury therefore probably believed. Tooth may be quite correct and the appellant may have left him at 3.15, got to the colliery by 4 p.m., and returned to Hednesford by 5 p.m. There is no reason for suggesting that Caddick and Goodwin have concocted their story, but Caddick is vague as to the time and was doing the same round every day; Goodwin was attending other sales, so both may be mistaken as to the

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date. Mrs. Leach does not help the appellant. The whole *alibi* suffers from the fact that it was never suggested until the trial.

DARLING J.: In this case the appellant was convicted with several others, one of whom was his own brother, of having taken part in a very discreditable riot at the Littleton Colliery. He was convicted on the evidence of one witness only, Cooper, who said that at the time when the cabin was still burning he saw the defendant there, asked him for a match which the appellant said he could not give him as he had used his last setting fire to the cabin.

Evidence has been called before us to-day, which was not before the jury, and Horridge J. mentioned this as being by far the weakest case of all that were tried. Now, apparently the burning of the cabin was completed by 4.45 or 5 p.m. If the appellant got to the colliery after that time he did not set the cabin on fire. No doubt other discreditable conduct took place after that, but that was not what he was charged with. The Court having to consider this evidence does not come to the conclusion that Cooper invented his story. The appellant undoubtedly went to the colliery, and very possibly he did say something of the kind; it may not have been true, but it was probably the popular side to be on. Many people like to shout with the largest crowd, and the appellant may be one of them, and may have said what Cooper alleges, but may not have said it at the time the cabin was burning. Cooper gives no definite evidence as to the time at which the appellant said it; that is not remarkable since there was a turmoil.

That being all the evidence against the appellant, what would the jury probably have done? We think it impossible to come to the conclusion that the evidence for the defence would have made no effect on the jury; it makes an effect on us; we cannot say that the appellant must be guilty, and it naturally follows that the jury would have been influenced by this evidence. Some of the evidence called made no impression on us, but Mrs. Leach, and still more Purslow, made a great impression in the direction of showing that the appellant left Rugeley at about the time at which the cabin was fired, and probably had not got beyond Hednesford by 5 p.m. The evidence of Purslow is very impressive, and it agrees with that of Ingram and Jarvis. The result

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is that we hold it impossible to say that the case is beyond doubt, and impossible to say that the same verdict would have been returned if this evidence had been before the jury. It is a great pity it was not given at the trial. It appears to us that we can reach the conclusion we do reach without in any way indicating that Cooper is saying what he knows is not true. The appellant may be discharged, and if he has any complaint he has brought the whole inconvenience on himself by not having called at the trial the evidence which he has called here to-day.

Conviction quashed.

Solicitor for the Appellant—*C. A. Loxton*, Walsall.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHANNELL, AND MR. JUSTICE AVORY.

DAVID WATSON.

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14 *October*.

Application for leave to appeal after sentence served.
When an application is made much out of time, the Court will only grant it for strong reasons.

This was an application for extension of time for appealing against conviction on a point of law, and for leave to appeal against conviction on fact. Appellant was convicted on the 26th May, 1911, at the Central Criminal Court, before Mr. Commissioner Rentoul, of bigamy, and was sentenced to twelve months' imprisonment with hard labour.

Applicant in person. I married a lady at St. George's Church, Hanover Square, in 1895, and some two months later I re-married her. In 1905 I married another lady in South Africa. I was convicted on the 26th May, 1911, and have served my sentence, but I am anxious that the conviction should be quashed. The grounds of my appeal are, first, that the judge failed to direct the jury that marrying the same lady twice was not bigamy; secondly, that the lady with whom I went through the form of marriage in 1895 was already married; this was my defence at the trial, but I was unable then to substantiate it; I am now in a position to produce evidence on the point. Thirdly, that the second lady made a false declaration before my marriage with her which, according to Roman-Dutch law, invalidates the marriage. She stated that she was the widow of a certain major; in fact, she was never married to him, and was a spinster in 1905. I did not raise this defence at the trial because I thought the one I raised would secure my acquittal, and I had promised the latter

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lady not to disclose the fact. Both marriages were therefore invalid, and I was not guilty of bigamy. The reason why the appeal is so much out of time is that I left the matter in the hands of a solicitor, who took no steps, and who has, I understand, absconded.

The LORD CHIEF JUSTICE: It is quite impossible for us to give effect to this application, and I doubt if we have any jurisdiction in the matter; in any case there are no materials on which we can give leave to appeal. The applicant was tried on a charge of bigamy on the 26th May, 1911, was convicted and sentenced to twelve months' imprisonment with hard labour. That sentence he has served, but he comes to the Court more than a year out of time and asks for leave to appeal. He does not suggest that at the trial the jury was misled except possibly on one point. He admits that he was unable to substantiate his defence that the "first wife" was already married when he went through the form of marriage with her. That matter cannot be re-opened now.

In the second place, he desires to appeal because the "second wife," the woman he was alleged to have bigamously married, had given incorrect information which according to Roman-Dutch law would invalidate the marriage. This defence was not raised at the trial, and in this case it is not open to the appellant to raise a new defence on appeal which he could have raised on his trial. He also says that the judge may have misled the jury and led them to believe that the fact that he married the former lady twice constituted bigamy, but I can see nothing to shew that the jury were misled. If he had any ground for alleging misdirection he ought to have brought the matter before the Court before now. The application is much out of time, and nothing has been shewn that would justify us in allowing an extension of time

Application dismissed.

A. L. B. T.

ALEXANDER HEMINGWAY.

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Lord Alverstone C.J.
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If evidence of a previous conviction of the defendant is improperly given the Court will quash a conviction which may have been due to the jury knowing the fact.

This was an appeal against conviction upon the certificate of the acting Deputy-Chairman who tried the case. Applicant was convicted on the 12th September, 1912, at the County of London Sessions, of attempted burglary, and was sentenced to twelve months' imprisonment with hard labour.

H. W. Rowsell for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant and a man named Partridge were convicted of attempted burglary at the house of a Mr. Claydon at about 10 p.m. on the evening of the 24th August. Claydon heard the noise of breaking glass, and looking out, saw two men in cloth caps making off. He dressed, telephoned to the police, and then went out; he stopped to speak to a butcher, and while he was doing so the two prisoners passed wearing caps, and Partridge with his wrist bound up. Claydon jumped to the conclusion that these were the men who had tried to break into his house, and taxed them with it. Partridge said he worked for a man named Hogg, whom they then all went to see. On Hogg confirming this statement, Claydon expressed himself as satisfied. A little later the two men were stopped by a policeman, who asked Partridge how he had injured his wrist; Partridge said he had had a row with a man, who bit it. This, and the fact that the prisoners were together at 8 p.m. on that evening, was all the evidence against the appellant, but the certificate was granted for the following reason. The appellant had been several times previously convicted, but no mention was made of this in the Deputy-Chairman's calendar. He, intending to assist the prisoner, who was undefended, asked a question, with a view of shewing that his character was good, which elicited the fact that the appellant had been previously convicted. He directed the jury to disregard this fact, and summed up much in his favour. On such slender evidence, and after such a summing up, it is most improbable that the jury

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would have convicted the appellant had they not known that he had been previously convicted

Scott-Crickitt for the Crown. The appellant was with Partridge, against whom the evidence was stronger, both before and after the attempted burglary; this was evidence on which the jury could convict. The way he conducted his case suggested that he had been previously convicted, even before the fact was mentioned; further, any bias that there may have been against the prisoner was effectively dispelled by the summing up.

The LORD CHIEF JUSTICE: In this case we think that the conviction must be quashed, without expressing any opinion as to the innocence or guilt of the appellant. We are only dealing with the trial, at which an incident took place which may have led the jury to return a verdict which they might not otherwise have done. At 10 p.m. on the 24th August two men were outside Claydon's house; there is very little evidence who the second man was, but Partridge was certainly one. In those circumstances the only evidence against the appellant is that he was with Partridge early in the evening and also after Partridge's wrist had been injured. It is suggested by the prosecution that the injury was caused by broken glass at Claydon's house. We do not say that there is no evidence against the appellant, nor should we in the ordinary course feel in a position to quash the verdict after he had given evidence and been seen by the jury; but, unfortunately, in attempting to assist the prisoner, the judge quite innocently elicited the fact that the appellant had been previously convicted. It has been frequently decided that, except in certain circumstances which do not arise in this case, evidence of previous convictions must not be given against a prisoner, and this information ought not to have been before the jury. We cannot assume, though it may possibly be the case, that the appellant so conducted his case as to shew that he was an expert in criminal law. In a case where the evidence was slight, the knowledge of a previous conviction may have influenced the jury. It is better that a guilty person should escape than that an innocent one should be convicted. This conviction will be quashed.

Conviction quashed.

A. L. B. T.

FREDERICK WILLIAMS.

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Lord Alverstone C.J. Channell J. Avory J.

Habitual criminal.—The nature of the primary offence on which the allegation of being a habitual criminal is founded may alone justify the charge.

This was an appeal against conviction as a habitual criminal, by leave of Bankes J., and against sentence. Appellant was convicted on the 13th August, 1912, at the Surrey Sessions, of horse-stealing and of being a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention.

A. T. Bucknill for the appellant (under s. 10 of the Criminal Appeal Act), who was present. This appeal is only against the conviction and sentence as a habitual criminal. The appellant was sentenced to three years' penal servitude in April, 1909, for shopbreaking, and he was released on licence on the 7th June, 1911. He then served for two months on board the S.S. *Brecondale* as a fireman; he was paid off in London and went to Bristol, where he was arrested for failing to report himself, and sentenced to one month's imprisonment. On his release he worked for a fortnight on the S.S. *Zephyrus* in dock, but he states that he failed to join her when she started on her voyage to the River Plate, that was about the beginning of October, 1911. His own evidence is to the effect that he then tried to get work at a colliery, but failing to do so, went to Croydon, where he had work in connection with a marine store until April, 1912. After that he did three weeks' work tree-felling, and assisted the police by providing them with information; this is confirmed by Inspector Hawkins. He committed the crime of horse-stealing in July, 1912, and having regard to the fact that he really attempted to earn an honest living in the time that elapsed after his release from prison in June, 1911, it is submitted that he could not rightly be convicted as a habitual criminal.

J. F. Vesey-FitzGerald, for the Crown, was not called upon.

CHANNELL J.: The real question in these cases is whether the man is leading persistently a dishonest or criminal life; that has been interpreted to mean whether, at the time he committed

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the crime for which he is indicted, he has reverted to criminal courses. It often happens that a man who has been convicted after coming out of prison for a time does some work, and that is a circumstance in his favour. There have been cases where this has been done, and then an offence is committed under the influence of a sudden temptation; in such a case there is no evidence that the prisoner is a habitual criminal, but the mere fact that he has done some work is not a sufficient defence to this charge, although an impression to this effect has got about among the criminal classes, probably because an allegation that the prisoner has done no work since his last release from prison is often included in the statutory notice which is served upon him. Much depends upon the particular offence of which the prisoner is convicted. In the present case it is clear that the appellant did a certain amount of work and that there was a substantial interval after his release from prison—something over a year, for a considerable portion of which he was obviously leading a fairly honest life. Then his work comes to an end; there is an interval of three weeks, at the end of which he is found committing a crime, having housebreaking implements in his possession. This is evidence that he had got tired of working and had gone back to a criminal life. If that was the case the jury could rightly convict him of being a habitual criminal, and the conviction must therefore be affirmed. The sentence may run from the date of conviction.

Appeal dismissed.

A. L. B. T.

ERNEST KESINGLAND.

Mitigation of sentence in view of good character.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted at the Croydon Borough Sessions on the 1st July, 1912, of housebreaking, and was sentenced to three years' penal servitude.

Appellant in person. I have twice been convicted before, on both occasions for bigamy. I served in the army in the South

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African war and in India. and had a good character. I was totally destitute, and committed this crime on the spur of the moment. I have been promised employment on my release from prison.

G. C. Whiteley for the Crown. The property found on the prisoner was only of £10 or £12 in value, but it came from at least two different houses. The appellant was indicted with a man named Privett and his wife; he pleaded guilty, and the Privetts were tried. It then appeared that Privett knew nothing of the robberies; the appellant was practically living with Mrs. Privett, and she was helping him to dispose of the stolen property. Evidence of all the robberies was given at the trial under the Prevention of Crimes Act, 1871, but he did not plead guilty to the other indictments.

AVORY J.: Upon the information now before the Court it appears that the appellant had no previous conviction against him for dishonesty, although he had twice been convicted of bigamy. In all the circumstances, and especially having regard to his good character in the army, and the statement he makes that he committed the offences when destitute, the Court thinks the sentence imposed in this case too severe, and it will be reduced to one of twelve months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

AMAR NATH DUTT.

21 *October*

Conviction quashed in view of fresh evidence.
Only in exceptional cases will the Court hear witnesses who, without good reason, were not called at the trial.
On an indictment for obtaining by false pretences there must be a direction on the guilty knowledge of each obtaining.

This was an appeal against conviction and sentence by leave of the full Court. Appellant was convicted at the County of London Sessions on the 20th September, 1912, of obtaining money

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by false pretences, and was sentenced by the Acting Deputy-Chairman to four months' imprisonment in the second division, but was on bail.

R. D. Muir, for the appellant, who was present. Although leave has been given to appeal against sentence, I do not suggest that if the conviction is good the sentence is excessive. The appellant is a native of India, and is a music-hall artist, producing what is known as an "illusion turn." For this he required special apparatus, and in September, 1911, he gave an order to Servais Leroy & Co. for such apparatus. They required some security for payment, and the appellant deposited with them a contract between himself and "the Gibbons circuit." That contract was said to have been dated in January, 1911, and was for an engagement lasting twelve or fourteen weeks at various halls, starting on the 30th October, 1911, at the Putney Hippodrome at a salary of £100 weekly. The appellant said he had negotiated that contract with a music-hall agent named Davies; it was in fact a forgery, and the name of Mr. Read, who is manager for Gibbons, but has no authority to sign contracts, was forged on it. About that time the appellant had advertised in the *Daily Telegraph* for a manager who could advance £150, and who was to receive a salary of from £3 to £5 weekly. A man named Conway answered that advertisement, and the appellant met him outside Leroy's office and showed him the contract with Gibbons; this was on the 3rd October. Conway was a butcher, with no previous theatrical experience. On the same day they went to Mr. Lewthwaite, Conway's solicitor, who examined the contract. On the 5th October a contract was signed appointing Conway the appellant's manager at a salary of £5 weekly, and he advanced £150, undoubtedly on the strength of the appellant having a genuine contract with Gibbons. The money was paid into a joint account, and practically all of it was used for the purposes of the show. There was a stipulation in the contract that the money in the bank was to be made up to £150 at the end of each week, but this was broken with Conway's acquiescence. Three other sums were paid into the account, £100 on the 17th October, £50 on the 20th October, and £150 on the 15th November, and the four sums so paid were the subjects of the various counts in the indictment. Between the 5th and 23rd October, according to

the appellant's statement, he went to Gibbons's office and handed in a parcel which was said to contain billing matter for his show. The company had an engagement at the Colchester Hippodrome for the week beginning the 23rd October, and went down a few days earlier to rehearse. While there the appellant says he went to London to Davies's office in Duke Street, Piccadilly, saw Davies's clerk, a man named Aplin, and told him he had had no reply from Gibbons about the bills; that Aplin asked for the contract and said, "Leave it and I will see what can be done." He did so, and, according to his evidence, returned on the 24th October. On the staircase of Davies's office he met a girl who said Davies had been arrested for swindling music-hall artists. Davies, according to the appellant, had asked the appellant for £100 for treating managers and others; the appellant paid him £35, and had promised to pay him the balance. It is the fact that Davies was arrested about that time, and was convicted of frauds of this nature on some thirty-eight persons. According to the appellant, failing to find Aplin he returned to Colchester, and in the presence of one of his employés, Arthur Leybourne, told Conway what had happened. Leybourne was present at the trial, but was not called by counsel, who defended the appellant there; no doubt his object was to secure the last word to the jury. Leave has been given to call Leybourne as a witness here.

Arthur Leybourne, called and examined by *Muir* for the appellant. I am a music-hall artist, and have been employed by the appellant almost continuously for the last four or five years. I was with him in October, 1911, at Colchester, and I remember his going to London on the 24th October. I met him at the station when he returned, and at the theatre he asked me to fetch Conway; I did so, and in my presence the appellant told Conway that Davies had been arrested, and that the Gibbons contract was a bogus one. Conway asked for the contract, and the appellant said he had given it to Davies's man the week before. Conway said, "You needn't worry; you have a good show and we shall get plenty of bookings." I was present at the hearing at Halifax.

Cross-examined by *Coumbe* for the Crown. I was first spoken to about this conversation when the case first came on at Halifax.

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I am still in the appellant's service; if the show closed I could get another engagement at once.

Muir: After that date, namely, on the 15th November, £150 was advanced. A number of halls were visited after that, and in the following week they went to West Bromwich under a contract with the persons for whom they performed at Colchester. Conway's evidence was that the appellant told him he could alter the dates under the Gibbons contract at will, and that the show was not good enough for them at present; this explanation was given by Conway for the first time at the trial.

In November Leroy brought an action in the Clerkenwell County Court against the appellant and Conway as partners; they defended jointly and counterclaimed for damages; Leroy was successful in the action, but lost on the counterclaim. When Conway was applied to for payment he wrote a letter, dated the 16th March, 1912, threatening to murder the appellant. On the 27th March Conway fired several shots on the stage at Halifax, apparently with the intention of frightening the appellant, and although he had before that complained of having been defrauded, it was stated in the police court proceedings that arose out of that offence that he had said for the first time that he had been swindled by means of the Gibbons contract. Conway was tried at the Leeds Assizes before Channell J., found guilty of a common assault, and sentenced to four months' imprisonment in the second division. In May Conway started a prosecution against the appellant, but the case was dismissed by the magistrate; Conway, however, preferred a bill before the grand jury at the Sessions. The suggestion made on behalf of the prosecution was that the appellant forged, or procured the forgery of, the contract, and that when he heard of Davies being prosecuted he took the opportunity to father the matter on to him.

The summing up is carefully reasoned, but shews that the judge thought it would be unreasonable for the jury to convict; he did not, however, direct the jury that it was necessary for the prosecution to prove that the money was parted with on the strength of the representations. If the appellant forged the contract it would have been courting discovery to have left it for some time with Leroy, or to have allowed it to be inspected by Conway's solicitor. Davies was called at the trial, and stated

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that he had a record of all the money he had obtained, but that there was no record of any payment by the appellant; both he and Aplin gave answers that shewed they were unworthy of credence, apart from the fact that Davies was a convicted criminal. On the ground that the verdict was unreasonable, and that the summing up was incomplete and misleading, I ask the Court to quash the conviction.

Coumbe for the Crown. The payment made on the 15th November stands on a different footing to the others, and I emphasized this in opening the case to the jury. Even if the appellant thought the Gibbons agreement a good one before the 24th October it was open to the jury to convict him on the last payment. The jury may have suspected that the appellant forged the agreement, but I was careful not to suggest this, as I had no evidence to support it. The appellant said that he wrote to Gibbons about the contract; no evidence on this point, or as to his delivering billing matter to them, has been called either at the trial or here, although such evidence would have been most material. Conway was an uneducated man, with no previous theatrical experience, and may well have been deceived by the appellant; evidence was given that it was quite a usual thing to postpone engagements to oblige artists. If after the 24th October the appellant wrote letters suggesting that the Gibbons contract was in order, it was evidence on which the jury might disbelieve him. He wrote to Stirling, a representative of Leroy, "Next week I am going to Canning Town with full responsibility of Gibbons." He explained that he meant by that that he had done with Gibbons, but it is impossible to accept that interpretation.

[AVORY J.: In the same letter he asks Stirling to book him, which is inconsistent with the idea of the Gibbons contract being in force.]

When the appellant heard that Davies was in the hands of the police he never communicated with them; further, Davies shewed that the representations in this case were of a different kind to those in the frauds for which he had been convicted.

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The jury had ample evidence on which they could disbelieve the appellant, and this conviction ought to stand.

The LORD CHIEF JUSTICE: We have the greatest difficulty in dealing with this case. If we have to quash the conviction, as we think we must, it is the nearest approach there has yet been to this Court differing from a conclusion of fact arrived at by a jury on the evidence properly before them. It has often been pointed out that we do not re-try cases where there has been a conviction on proper evidence and there is no suggestion of misdirection.

This case has some very peculiar features which it will be better to deal with first. The allegation is that false pretences were made in October and November, 1911, as a result of which considerable sums were paid by Conway to the joint account of the appellant and himself. Violent disputes arose between the parties, and there is no doubt that Conway was saying he had been defrauded by the appellant; he behaved in an extraordinary manner, using firearms, apparently more for the purpose of frightening the appellant than injuring him. In March, 1912, he was charged at Halifax with firing at the appellant, and until then, as far as the evidence shews, he had never before alleged that the particular way in which he had been defrauded was by means of the Gibbons agreement. All the cases were treated as one, and dealt with on the footing that the agreement, by whomever concocted, was false to the knowledge of the appellant. This point was not, we think, satisfactorily dealt with in the summing up; it is now easy to see that there ought to have been more discrimination between the different advances, and the circumstances under which they were made.

There is a further difficulty. An important point made by the appellant is that on the 24th October, 1911, he was practically informed that his agreement with Gibbons was worthless. An honest man having dealings with Conway, and having had £300 from him, would at once have told him of his altered circumstances in respect of the Gibbons agreement, for whatever arrangements were made with other halls, it was the Gibbons agreement that gave value to Conway's contract. At the trial it was said by the appellant that he had told Conway on the night of the 24th October that he had found that the agreement

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was a sham. Undoubtedly the defendant's counsel at the trial had in his brief the proof of a man who said he met the appellant at the station, and heard him call for Conway and tell him of his fears. It is unfortunate that that witness was not called. We wish it to be understood distinctly that it is in the rarest possible instance that we will act on evidence called on appeal which might have been called at the trial. It would be impossible to conduct the business of this Court if defendants set up one defence at the trial and another on appeal. We are not criticising counsel, but it is obvious that the witness Leybourne was not called at the trial from a desire to secure the last word to the jury. One considers that, because we have allowed Leybourne to be called, and are to a certain extent impressed by his evidence. We are not prepared to disbelieve Leybourne, and if the story he tells is the same as that told by the appellant at his trial, it is a circumstance which weighs in favour of the latter.

I now come to that part of the case which leads us to take the view that as tried, the case was not satisfactorily tried. We are not criticising the judge who tried the case with great care, but there were certain broad considerations which were overlooked. This case again shews that it is important that the Court should have the power of ordering a new trial; if it had that power the case is certainly one which demands fresh inquiry. The judge seems to have somewhat overlooked one of the essentials of a charge of obtaining money by false pretences, namely, that the pretence must be false at the time it is made to the knowledge of the defendant. There was not a sufficient examination of the dates of the payments by Conway, and the circumstances under which they were made. There were three payments in October and one in November for £150. In August or September the appellant had deposited the agreement with Leroy as security, and if there was any evidence before the jury that it was forged by the appellant, then the method by which the money was obtained was fraudulent from the beginning. For two months roughly it appears to have remained in the custody of Leroy, and to have been used as a *bonâ fide* document by him. There is no evidence that at that time the appellant knew it was false; if it was suggested that it was forged by him there was no necessity for such evidence, but Mr. Coumbe very properly admits that he had no evidence on which he could make any such sug-

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gestion. In October, wanting to get an advance, he obtains the agreement from Leroy and takes it to Conway and his solicitor, who examine it; no question as to its genuineness was raised at that time. Three advances were made and then comes the critical time. We have not seen the agreement, or a copy of it, but it is agreed that the engagement was to commence on the 30th October. That something happened before then is obvious, for we find the appellant at Colchester making arrangements with his then employers to perform the following week at West Bromwich. It is not suggested that Conway, as secretary, did not know this, but it was not until March, 1912, that he suggested that the agreement was fraudulent, and it is difficult to believe that Conway all this time thought the agreement good. It is suggested that the appellant told Conway that he could get the dates altered, but this seems an insufficient reason for continuing to treat as good an agreement which ought to have come into force in October. What is the evidence that the appellant knew the agreement was bad? As to the period from August to the latter part of October there is no evidence, but Davies and Aplin said they had never seen the appellant. The strength of the case against the appellant was that Davies said that the story that he had paid him £35 and was under a liability to pay him £65 was untrue, and Aplin said it was not true that he had met the appellant at the office in October. The Court have no hesitation in saying that the jury ought to have been cautioned as to Davies's evidence. In the box he was obviously saying some things that were not true, and there ought to have been more caution in accepting his evidence, there being no other evidence to suggest that the appellant had concocted the agreement on which he certainly was acting, for it was natural that he should go to London if he heard nothing from Gibbons.

At the trial the four payments were treated as being on the same footing, and not sufficient was made of the importance of the evidence as to whether Conway was told of the incident of the 24th October or not. The case was suggested as being that of a bogus agreement from the beginning, and that Conway was never told it was a bogus agreement at all. There are other minor criticisms which it is not necessary to enter into. If it is kept in view that in indictments for obtaining money by false pretences the important thing is the knowledge of the person making the

pretences, and if there was no evidence at the trial that when the payments were made the appellant knew the agreement was bad, the other incidents criticised are not important. It was not wise to treat all four payments as being in the same position, and the jury ought to have been cautioned about accepting Davies's evidence; so we cannot say that if Leybourne's evidence had been before them the jury would have returned the verdict they did. Mr. Coumbe tells us that he made a strong point on the last payment; if he did so and relied on it, it was all the more necessary that it should have been pointed out that the other three payments were not on the same footing. I must again express my regret that we have no power to order a fresh investigation by a jury. The appeal must be allowed.

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Conviction quashed.

Solicitors for the Appellant—*Hepsley C. Duckworth & Co.*, Brentford.

Solicitors for the Crown—*Clarke, Lewthwaite & Co.*, Islington.

A. L. B. T.

CHARLES WEBBER.

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Habitual criminal.—It is not a ground for conviction that prisoner has refused to give an account of himself since his last release from prison, and notice of such evidence, which is relevant to the charge, though unnecessary, does not invalidate a statutory notice otherwise good.

This was an appeal against sentence, and an application for leave to appeal against conviction as a habitual criminal and to call further evidence. Appellant pleaded guilty on the 26th September, 1912, at the County of London Sessions, to housebreaking, and was convicted of being a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention.

C. G. Moran for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The statutory notice served on the prisoner contained the following as one of the grounds on

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which the prosecution based the charge that the appellant was a habitual criminal—"That when you were asked to give some account of yourself, in order that you might have an opportunity of shewing that you had, since the date of your last release from prison, been following some honest employment, you declined to give any information which could be verified on the subject." This is a bad ground, as it shifts the onus of proof on to appellant, for appellant is placed in this position: if he refuses to give information to the police he is, *ipso facto*, according to the "ground," a habitual criminal; if he gives information and the police choose to bring the witnesses to the Court, they are appellant's witnesses, and he has been forced to take upon himself the onus of proof.

Further, the police inspector had no right to ask appellant questions when he was in custody.

Secondly, if it was a good ground, it was not supported by the evidence, for the police admitted that the appellant had written from prison, giving the name and address of one Frank Childs, for whom he had worked. The police obtained a statement from Childs, which was read at the trial.

Thirdly, evidence was given at the trial by a detective, who said he had known the appellant for twelve years as a persistent artful housebreaker, and that he had never known him do any work. When asked if "artful" was a term of science, he said that it was, and that the prisoner worked with another man "in pairs." Nothing in the statutory notice justified this evidence, and therefore on the authority of *Fawcett*, 5 Cr. App. R. 115; 74 J. P. 444 (1910); *Moran*, 5 Cr. App. R. 219, 75 J. P. 110 (1910); and *Maxfield*, 28 T. L. R. 454; 7 Cr. App. R. 230 (1912), the conviction should be quashed.

Lastly, the summing up was unsatisfactory, as the material question was not brought before the jury. The appellant gave a good deal of evidence as to work he had done in the interval before his last conviction, and his attention, and that of the jury, were never called to the fact that it was the interval since his last release that was important. He was last released on 10th November, 1911; he was arrested early in September, 1912—an interval of about ten months. The appellant said he had been working for Gibson & Co., and the acting Deputy-Chairman threw doubt on their existence. Gibson is here, and leave is asked to call him and Childs.

Mark Stebbing, for the Crown, was not called upon.

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AVORY J.: The appellant was convicted as a habitual criminal, and it is suggested that the conviction is bad first on the ground that the notice required by the Act contains a ground that is bad. [His Lordship read the paragraph quoted above.] It is obvious that in point of form it is not a ground on which a man can be convicted of being a habitual criminal; it is in fact evidence for the purpose of satisfying the jury that the appellant has done no honest work. The fact that the notice states that such evidence will be given does not make the notice bad, though it is going beyond what is necessary, since there is no statutory necessity to state the evidence that will be brought. A further objection is that evidence was admitted which was not within the four corners of the notice. It is necessary to see what the notice was; it stated that the appellant would be charged that he was a habitual criminal on the ground—"(3) That between the 5th of August, 1879, and 11th August, 1910, you have been convicted once of burglary, five times of housebreaking, and once of being in possession of housebreaking implements by night, and for these offences you have undergone sentences of imprisonment and penal servitude, and you have now been committed for trial for the crime of housebreaking" Appended to the notice is a list of convictions which may be proved against him; they shew that from 1878 he had again and again been convicted of burglary and housebreaking, and had been sentenced in 1890 to five years' penal servitude for housebreaking, in 1895 to three years' penal servitude for housebreaking, in 1900 to five years' penal servitude for housebreaking, in 1903, under the Prevention of Crimes Act, to nine months' hard labour and his licence revoked, in 1905 under the Prevention of Crimes Act, and in 1910 to eighteen months' hard labour for housebreaking. That list alone, coupled with the fact that he was then in custody on a charge of housebreaking, to which he had pleaded guilty, would have justified the jury in finding that he was leading persistently a dishonest and criminal life as a housebreaker.

At his trial he alleged that he had in some of the intervals between his terms of imprisonment done some honest work; as soon as he did so it became relevant for the police to prove that

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though that was a fact, he was also consorting with criminals. The appellant had had an opportunity of supplying the police with information as to the honest work he had done, but with the exception of mentioning Childs, he refused to give them any information. He now applies for permission to call evidence. The answer is that he had an opportunity of calling the evidence at the trial, and not only did not call the evidence, but when the police asked for the names of the persons for whom he had worked, refused to supply the information. The case was fairly put to the jury, and there is no ground for saying that the summing up did not fairly put before the jury the issue as to whether the appellant was leading persistently a dishonest or criminal life.

Appeal dismissed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHANNELL, MR. JUSTICE PHILLIMORE, MR. JUSTICE AVORY, AND MR. JUSTICE HORRIDGE.

JAMES MAY.

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On a charge of indecent assault, if from the facts proved the jury may reasonably infer consent, there ought to be a direction on the point; otherwise, and particularly if in the conduct of the case the issue of consent has been made secondary to the main defence, such a direction is not necessary.

This was an appeal against conviction on the certificate of the Chairman of the Berkshire County Sessions. Appellant was convicted at those Sessions on the 7th October, 1912, of an indecent assault, and was sentenced to three months' imprisonment in the second division. The case for the appellant was argued on the 22nd October before the Lord Chief Justice, Mr. Justice Channell, and Mr. Justice Avory, who ordered that the case should be re-argued before a fuller Court.

Cranstoun (with him *Cecil Walsh*) for the appellant (who had been granted bail). The appellant was convicted on an indictment charging him with two indecent assaults, committed on a girl of nineteen years of age, who was his servant, on the 18th and 25th August last. He is a solicitor and Town Clerk of Wokingham, and he occupied a house with a Mrs. Lunn, who acted as his housekeeper, and the prosecutrix. It was admitted that until the dates mentioned his conduct towards the girl had been all that could be desired. It was alleged that on Sunday, the 18th August, at 9.45 p.m., the appellant called the prosecutrix into the dining-room and took her hand; she said she struggled, but that he put her on his knee and assaulted her indecently; she said that the incident lasted some four to five

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minutes, that she was struggling all the time to get away; but she admitted that she had one arm free, and that the appellant kissed her several times; she added that she screamed once, but admitted saying at the police court that she did not. She went to bed shortly afterwards and locked her bedroom door, which was unusual. Mrs. Lunn found it locked when she came to wake her the next morning. The prosecutrix made, she alleges, a statement to Mrs. Lunn, but although she went home three times in the week, she made no complaint to her parents, and continued in the appellant's service. On the following Sunday, the 25th August, the appellant's son, who was ten years of age, was at home and was romping with the prosecutrix. She says that she dressed to go out, and then the appellant came into her room, pushed the door to, tried to throw her on the bed, and assaulted her as before. This lasted four or five minutes; she admits that she did not scream, although the boy was just outside the door; no one else was in the house. She went out for an hour, but did not go to her parents, who lived near; on her return, in answer to a question by Mrs. Lunn, she made a statement. On that evening Mrs. Lunn saw the appellant in the presence of the prosecutrix, and said, "I want to know what treatment Mary has received this Sunday and last," to which he answered, "I don't think I have done anything"; there were discrepancies in the evidence as to this conversation given for the prosecution before the magistrates and at the trial. On the same night the prosecutrix saw her mother, but only made vague statements as to what had occurred, and she then returned to the defendant's house. On the following morning the mother of the prosecutrix saw the appellant at the Town Hall, and said she wanted to know what had happened to her daughter, and she states that the appellant answered, "I have not done Mary any harm," but he denied this in his evidence. On that afternoon the girl was taken away by her father, who said to the appellant, "You know what the reason is." It was only four hours later that the parents learnt any details as to what their daughter complained of. No steps were taken for ten days, but on the 5th September a warrant for rape was applied for (owing to a misunderstanding on her part) and a summons issued. After that date the girl saw a doctor, and the misunderstanding was cleared up; he was not called to give evidence, but that summons

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was not proceeded with. On the 9th September two summonses for indecent assault were issued against the appellant.

The first ground stated in the notice of appeal is, "That the learned Chairman omitted to direct the jury that, although the defendant denied the facts alleged by the prosecutrix, they must be satisfied that she did not consent, and that if she consented to what was done the offence was not made out." My submission is that it is competent for the defence not only to deny the facts, but also to submit that non-consent, which was a necessary ingredient of the offence, had not been made out by the prosecution. The second ground of appeal is, "That the counsel for the prosecution in his final address to the jury informed them that, as the defendant had not alleged in his evidence that the prosecutrix consented, consent was not an issue in the case, and that the learned Chairman, in summing up, gave the jury no direction upon this issue." In my speech to the jury I told them that if the jury were satisfied on the evidence that the girl did not repel any act the appellant may have done, it was their duty to acquit him; Mr. Coventry, who appeared for the prosecution, told them that consent was not raised on the evidence, so they could sweep that question aside. Here was a question on a point of law which the Chairman should have dealt with in his summing up; he should have said which of us was right. Where the facts of the case are consistent with consent and non-consent it is the duty of the judge to direct the jury. See *Gibson*, 18 Q. B. D. 537; 56 L. J. M. C. 49; 56 L. T. 367; 35 W. R. 411; 16 Cox C. C. 181; 51 J. P. 742 (1887); C. C. R., where Wills J. said:—"I think no reasonable fault can be found with the prisoner's counsel for assuming that the Chairman would give a proper direction to the jury, but I agree that the course taken by the counsel has no bearing upon the question before us. If a mistake had been made by counsel, that would not relieve the judge from the duty to see that proper evidence only was before the jury. It is sometimes said—erroneously, as I think—that the judge should be counsel for the prisoner; but at least he must take care that the prisoner is not convicted on any but legal evidence;" and Mathew J. said, "We have to lay down a rule which shall apply equally where the prisoner is defended by counsel and where he is not. In either case it is the duty of the judge to warn the jury not to act upon evidence which is not legal evidence

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against the prisoner." The point is also dealt with in *Stoddart*, 73 J.P. 348; 53 S. J. 578; 25 T.L.R. 612; 2 Cr. App. R. 217 (1909), where *Abrath* v. *N. E. Ry. Co.*, 11 App. Cas. 247; 52 L.J.Q.B. 449; 49 L.T. 618; 32 W.R. 50 (1886), was quoted. These cases are also cited in *Horn*, 76 J.P. 270; 28 T. L. R. 336; 7 Cr. App. R. 200 (1912), which somewhat resembles this case. It is true that in *Horn* there was actual misdirection, but in this case there was non-direction, which amounted to misdirection. The Chairman should have told the jury the law on the subject of consent, and then analysed the evidence to see whether the prosecution had established absence of consent. This was certainly part of my defence; a great part of my cross-examination of the prosecutrix was directed to this point; I admit that I should have been acting contrary to my instructions if I had admitted consent, but the burden of proving non-consent lay on the prosecution.

[HORRIDGE J.: It is a great advantage to a prisoner to have counsel to raise an alternative defence.]

[The LORD CHIEF JUSTICE: I go further. I always will have counsel in this kind of case. Counsel can often take a point the prisoner does not know.]

[AVORY J.: It may be the duty of the Court to protect a prisoner against himself in cases of this character.]

[PHILLIMORE J.: Is it for the Court to raise a defence the prisoner has not himself raised? If there was non-direction, was it not your duty at the end of the summing up to ask the Chairman to direct the jury on the point? See *Wann*, 76 J.P. 269; 28 T. L. R. 240; 7 Cr. App. R. 135 (1912). It used to be the practice for counsel to call the judge's attention to misdirection.]

That may be true in civil actions, but not, I submit, in a criminal case.

[PHILLIMORE J.: Surely we ought to look at this case as if we were asked to grant a new trial in a civil case. At the end of the summing up it is quite proper to call attention to misdirection.]

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As the jury, if properly directed, might have returned a different verdict, the conviction should be quashed. *Deana,* 73 J. P. 255; 25 T. L. R. 399; 2 Cr. App. R. 75 (1909).

Further, there was really no corroboration of the girl's story; it is true that corroboration is not required technically, but the Chairman directed the jury that certain facts were corroboration, and asked the jury if the facts were true. This was a misdirection. The suggested corroboration was that the prosecutrix was heard to scream by Mrs. Lunn, who also found her bedroom door locked on the morning of the 19th August, but the evidence as to the screams was very contradictory, and the locked door was not corroboration, as it did not connect appellant with the offence.

[PHILLIMORE J.: Corroboration, in the old writers, such as Blackstone and East, meant evidence of consistency of conduct or character.]

Walsh, for the defence, asked permission to mention one matter.

The LORD CHIEF JUSTICE: You are not entitled to argue, but the Court will allow you to refer to some fact, although it should properly have been done through Mr. Cranstoun.

Walsh: I took a note of the summing up, as my leader had to leave the Court, and I noticed that there was no reference to the question of consent; I thought, however, that it was not the duty of counsel to point out omissions, but only to correct misstatements. The day after the trial the Chairman said he should refuse the certificate merely on the question of consent, as that had been fully discussed before the jury.

The Court required no argument on the question of corroboration.

The hon. R. Coventry (with him *Comyns Carr*) for the Crown. The principle on which this Court acts is, as was laid down in *Stoddart,* to deal with valid objections. In this case the defence of consent was never raised by the appellant, who is an educated man, well able to appreciate the point. I asked him in cross-examination whether he suggested that the prosecutrix consented, and he answered, "Certainly not; how could she consent

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to what never happened?" There is no need for a judge to address a jury on a question as to which the evidence on both sides agree, though it might have been necessary before the Criminal Evidence Act, 1898, gave the prisoner the right to give evidence himself. The only misdirection suggested is non-direction on a matter as to which, on the evidence, there was no dispute. It is true that counsel for the defence did suggest the point to the jury, but the jury have to decide on the evidence, which was all one way. I do not dispute that a judge might have to deal with the question where the facts are such that the jury might reasonably infer consent; it must depend on the facts of the particular case. This case is not analogous to *Horn*, where the jury were misled. On the evidence it is most unlikely that the jury, even if they had been directed on the point, would have found that there was consent. In his evidence the appellant was obviously telling untruths, and under cross-examination he altered his story. The summing up was favourable to the appellant, but the jury accepted the girl's statement as to the facts. The discrepancies as to the conversation were slight.

Cranstoun: The Chairman in his summing up failed to point out the contradictions in the girl's story.

The LORD CHIEF JUSTICE: Apart from the decision in this particular case, the argument raises a point of general importance, and before dealing with the case, the Court thinks it desirable to lay down, as applicable to this kind of case, the principle which should be followed. The Court is of opinion that if the facts of a case proved in evidence are such that the jury might reasonably infer consent, there ought to be a direction to the jury by the judge on that question. It is easy to point out where the onus of proof lies and what is the evidence on that point in any particular case. But if the facts proved in evidence are not such that the jury might reasonably infer consent, and particularly if the case has been conducted by counsel in such a way as to make the question of consent immaterial or an entirely secondary issue to the main defence, there is no necessity for such a direction. It is impossible to lay down a rule applicable to all cases, but this indication of the

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principle on which the judge should act will, we think, be sufficient as a general rule.

In the present case two objections have been raised to the conviction of the appellant; first, the absence of any direction by the Chairman as to consent, and, secondly, the suggestion that there was not a sufficient direction on the question of corroboration. Dealing first with the question of corroboration, in our opinion the point, though tersely put, was correctly put by the Chairman—Was there such corroboration as would justify the jury in acting on the girl's story? With regard to the question whether the facts were such that the jury might reasonably infer consent, the Court is of opinion, after considering the evidence most carefully, and taking into consideration the fact that the real issue fought was whether the girl's story was true, the facts were not such as to necessitate a special direction with regard to consent.

Apart from the question of misdirection, the Court has to consider whether there is any evidence on which it could come to the conclusion that there had been a miscarriage of justice. Having regard to the appellant's account of what happened on the Sunday evening, to the different accounts he gave at the police court, to the evidence of Mrs. Lunn, and her subsequent action, we think it is impossible to say that there has been a miscarriage of justice. The Court is of opinion that if there had been a direction as to consent the jury would not have found that there had been consent, and having examined the evidence carefully, the Court is of opinion that there has been no miscarriage of justice. That being so, the appeal must be dismissed.

Appeal dismissed.

Solicitors for the Appellant—*Webster & Webster,* agents for E. T. Hatt, Reading.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHANNELL, AND MR. JUSTICE AVORY.

GEORGE HAROLD WILLIAMS.

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Leave to appeal granted after sentence served.

This was an application for extension of time for leave to appeal against conviction. Appellant was convicted on the 29th October, 1911, at the Chelmsford Assizes, before Lawrance J., of housebreaking, and was sentenced to six months' imprisonment with hard labour.

CHANNELL J.: This is an unusual case. The appellant was sentenced to six months' imprisonment with hard labour at the Chelmsford Assizes for housebreaking; that sentence he has served, and he was released from prison some six months ago. The only evidence against him at the trial was that some of the stolen articles were supposed to be found in his possession. His character had been good. The appellant was a soldier, and the case has now been taken up on his behalf by some of the officers of his regiment. They have appealed to the Home Office, which inform them that it is a matter for the Court of Criminal Appeal. Some suspicion is now thrown on another man in the same regiment, who has been convicted of other stealing; with the property stolen by him was found one of the articles stolen in the housebreaking for which the appellant was convicted. The Court thinks it is a matter for further investigation, and therefore extends the time and gives leave to appeal.

Leave to appeal granted (*a*).

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(*a*) See p. 84, below.

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GILBERT OSWALD SMITH.

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Murder—Evidence of the condition of the prisoner's mind should not be called as part of the case for the Crown but in reply.

The defence is not bound to give notice that medical evidence of the prisoner's mental condition will be called.

This was an appeal against conviction on a point of law, and an application for leave to appeal against conviction on fact. Appellant was convicted on the 28th October, 1912, at the Gloucester Assizes, before Ridley J., of wilful murder, and was sentenced to death.

H. McKenna for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was convicted of the murder of his wife, who had left him some eight weeks before her death, after denuding the house of furniture. On the 30th July, the appellant and his wife met at a fête at Dursley, and high words passed between them; she said that someone had told her he was going to waylay her, and he replied, "It is a lie; tell me who it is and I will go and face it out." The quarrel passed off, and they went on the joy-wheel together, and then to a public-house; after a time the wife went out with another woman, who returned alone. The appellant then said to her, "You have been and let her slip; I am —— well after her,' and left the house. On his way home he met a man named Elliott, and said to him, "You will find some morning I have made a job of it; I shall do for her and myself." Elliott apparently thought he was drunk, as he sent his son to see him home. On the following morning, at 7.30 a.m., the appellant was met in the road by a man named Kinson, who said his manner seemed normal. The appellant sat on a stile by the side of the road down which his wife came every morning on her way to work. She saw him there, and fetched one Brown, and when they came up the appellant joined them and said, "Harry, I am not going to let her go down the road this morning." Brown answered, "Don't be stupid, Gilbert; you will only get yourself into trouble." They all three walked along the road together, and

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the appellant suddenly, in sight of Brown, cut his wife's throat with a razor; he then got over a stile and inflicted a serious wound on his own throat. A letter was found on him in which the following expressions occurred: "It is a bad job, but I can't resist —I am doing the grave deed which I am very sorry to do. She left me on her own account, and she has been persuaded by others to stop away from me, especially her sister Harriet." At the hospital he asked the policeman who was watching him what he had done. The policeman did not answer, but the appellant said, "Poor Rose," and started crying.

The only defence raised at the trial was that of insanity, based on epilepsy, and evidence was given that three relatives on his mother's side had been epileptic, and one on his father's side. He himself had had several fits until he was fourteen or sixteen years old; one witness described these fits as "little ones and bad turns." In 1894 he enlisted in the army, and had a fit just before doing so. In 1906 he was admitted to a military hospital and his record there contains this entry: "Said to have had a fit before admission. None during treatment." In the army he had served a good deal in hot climates. The last known fit he had was four and a half years ago.

Medical evidence was given which was shortly to the effect that epilepsy was thought to be hereditary; that there were two forms of epilepsy, major and minor, the latter being more damaging in its effects on the brain, and was insidious, it being possible for a patient to have it quite unconsciously and without anyone else suspecting it. The doctors said that it was possible that a man suffering from an attack of minor epilepsy would be under an uncontrollable influence under which he would not know the nature and quality of his acts. The fits might last for a moment or for a day. The first ground of appeal is, that the judge in his summing up did not put the substantial part of my defence to the jury; minor epilepsy was not referred to by him at all. In this way he unconsciously misled the jury who, but for this, ought to have found the appellant insane. Though the letter and certain expressions used by the appellant suggest premeditation, the doctors said that a fit might be entirely unperceived, and might last a long time. The letter may have been written only a few minutes before the murder.

Secondly, the judge commented on the fact that the defence

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of insanity was not set up earlier, but the appellant was undefended before the magistrates; also he said that, epileptic or not, the appellant ought to have been put in the witness box. When the defence is insanity such comments are not justified. The learned judge also objected that I gave no notice that I was going to call medical evidence: I was under no obligation to do so.

Lastly, evidence was improperly admitted, as Dr. Clarke, the prison doctor, was called for the prosecution and gave his opinion that appellant was sane when he committed the act. This was the very question the jury had to decide. It is true I did not object, because before I could do so the mischief was done. The verdict was unsatisfactory and should not be allowed to stand.

Hugh Sturges, K.C. and *A. Brice*, for the Crown, were not called upon.

The LORD CHIEF JUSTICE: Mr. McKenna has put forward everything that could be put to induce the Court to say that the verdict was unsatisfactory, or that the appellant was insane. It is not necessary to go at length into the facts of the case. On the day before the murder the appellant used language which amounted to threats, and on the morning in question he said, "I am not going to let her go down the road this morning," and then occurred the attack on his wife in the presence of Brown which resulted in her death. The facts as proved at the trial were most fairly and accurately put to the jury by the judge in his summing up. He mentioned the letter found on the appellant which referred to his feeling an impulse. There is some doubt as to whether the words in the letter are, "I can't resist," or, "I can't rest." The whole question is whether there was such evidence of insanity as makes the verdict of the jury wrong. In the opinion of the Court the jury would have been wrong if they had returned any other verdict. There was evidence of a feeling of resentment on the appellant's part, and the only suggestion made is that the man's own history, and that of his family, shew that he was epileptic. There was nothing to point to insanity in the nature of the act itself. He had suffered from epileptic fits, which were said to be minor epilepsy, up to the age of fifteen or sixteen, there was some indication of another fit when he was in the army, and he had one four and a half years ago. Beyond those circumstances there

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was nothing to support the suggestion that the murder was committed in an epileptic fit, and the matter was properly left to the jury.

As to the criticism that the judge commented on the fact that the appellant was not called to give evidence, we do not know the facts. It may be that a suggestion was made by counsel in his speech that the prisoner knew nothing about the matter, and the judge was then justified in saying that there was no evidence that the prisoner knew nothing about it; but in any case it was not misdirection. As to the other point to which exception has been taken, it does not appear that the judge was commenting on the fact that the defence of insanity had not been set up before the magistrates, but on the fact that the prosecution had not been warned that the defence intended to call medical evidence. There was no obligation on them to do so, and we do not quite know why Dr. Clarke was called. Evidence as to the condition of the prisoner's mind should be called, if required, in reply, and not as part of the case for the Crown. There was no substantial misdirection, and the Court is unable to allow the appeal.

Appeal dismissed.

A. L. B. T.

JAMES WILLIAM PEARSON CAMPBELL.

If substantial evidence against the defendant has been improperly admitted the Court will quash the conviction.

This was an appeal against conviction, by leave of Phillimore J. Appellant was convicted on the 15th October, 1912, at the Cornwall Sessions, of burglary, and was sentenced to eighteen months' imprisonment with hard labour.

W. Blake Odgers, junr., for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant in this case had set up an *alibi*, and had got the governor of the prison to write a letter to a shopkeeper in Lostwithiel, making inquiries as to prisoner's movements; a reply was received to the effect

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that a police constable had called at the shop and would communicate with Superintendent Banfield. The Chairman read that letter to the jury in his summing up, and at that point Banfield was called into the witness box and gave hearsay evidence as to the appellant having been seen in Lostwithiel, but not on the day on which the burglary was committed.

(He was stopped by the Court.)

W. T. Snell for the Crown. The admission of Banfield's evidence is not one of the grounds on which the appellant asked leave to appeal. He had given evidence as to the letter which the governor of the prison wrote, and while the Chairman was summing up he handed up the letter which had been received in reply. The Chairman then called Banfield, though he could not have known what his evidence was going to be. Similar evidence was given in *Gray*, 6 Cr. App. R. 242 (1911). Even if there was an irregularity in the trial there was no miscarriage of justice. There was strong evidence of identity, and in such circumstances the Court ought not to quash the conviction. *Brann*, 1 Cr. App. R. 256 (1908).

[The LORD CHIEF JUSTICE: *Brann* does not deal with this point at all. The head note is not in accordance with the judgment.]

The LORD CHIEF JUSTICE: In the opinion of the Court this conviction must be quashed. It is extremely important that as a general rule cases should be conducted strictly; at times inadmissible evidence is allowed to be given at the request of the prisoner, but what was done in this case was certainly not done at the request of the appellant. Banfield was called and gave evidence of statements that had been made to him; the evidence was not given in the ordinary way, nor was the appellant given a chance of cross-examining Banfield. The evidence was admitted just before the jury were asked to return their verdict, and it was evidence which was clearly inadmissible. The Chairman then went on to say, "I think it is more satisfactory for you to hear this statement, although it does not support the prisoner's statement." Banfield's statement was hearsay, and therefore not admissible in evidence; therefore, though the Court

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does not say that there may not be cases where such evidence may be given at the request of the prisoner, this case was not one of them. The Court has often pointed out that even if inadmissible evidence is given at the trial, the appeal may be dismissed on the ground that there has been no miscarriage of justice; but, so far as I can remember, in no case has the Court done so where there has been improper admission of substantial evidence. *Gray* is certainly not such a case. It is not possible to say that this evidence may not have had a serious effect. It is true there was weighty evidence besides this, but we cannot say that the jury would have returned the same verdict on that evidence alone; the appeal will therefore be allowed.

Conviction quashed.

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE CHANNELL, AND MR. JUSTICE AVORY.

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HANNAH FINE.

Severity of sentence—If the Court sets aside a recommendation for expulsion, it may lengthen the term of imprisonment.

This was an appeal against part of the sentence, namely, the recommendation for expulsion, by leave of Phillimore J. Appellant was convicted on the 15th October, 1912, at the Stafford County Sessions, of feloniously receiving stolen goods, and was sentenced to two months' imprisonment in the second division, and recommended for expulsion.

Appellant in person. I was married at Lincoln three years ago; I did not go to any church or before the registrar, but my husband gave me a ring.

de Satgé for the Crown. There is considerable doubt whether the appellant is married, she and her husband pass under different names. The offence of which she was convicted was a serious and dangerous one, since it is the cause of crime in others.

DARLING J.: In this case the appellant was convicted of receiving certain goods, some of which were valuable, and was sentenced to two months' imprisonment in the second division, and recommended for expulsion. She has appealed, and leave has been granted only in regard to that portion of her sentence which recommends her for expulsion. On an appeal against sentence the Court could, while allowing her appeal as far as the expulsion is concerned, increase it as regards the other part,

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and it is not at all clear that on this appeal we ought not to order her to be detained for a longer period. Probably the Chairman would have sentenced her to a longer period of imprisonment had he not recommended her for expulsion.

The conclusion that the Court comes to is that, taking it as doubtful if she is legally married, an order for expulsion would be a very serious punishment. She has a child, and we do not know what would become of it, or which parent would be liable for its support. We do not decide whether the appellant is married or not, or whether if she is married, we could allow the order for expulsion to stand, which would in effect be an order, not only for punishment, but for divorce. It is not necessary to decide that point, since there are other good grounds for quashing that part of the sentence. The crime was not one of the most serious of its kind, but the sentence is a light one as far as the imprisonment is concerned. The Court does not consider whether it is necessary to increase the term of imprisonment, because the appellant has already been in prison for nearly a month, which will not count as part of her sentence. The appeal as to the recommendation for expulsion will be allowed, and the imprisonment will date from to-day, so it will really be increased in the manner indicated.

Sentence varied by setting aside recommendation for expulsion.

A. L. B. T.

DAVID HIGGINBOTTOM.

On an indictment for receiving stolen property, if there is evidence that it was found in defendant's possession, the jury must be carefully directed on the question whether he had any knowledge where it was.

This was an appeal against conviction and sentence, by leave of Phillimore J. Appellant was convicted on the 16th October, 1912, at the Derby County Sessions, of feloniously receiving stolen goods, and was sentenced to five years' penal servitude.

Disney for the appellant (under s. 10 of the Criminal Appeal

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Act), who was present. The ground of appeal in this case is that the appellant did not know that the stolen property was in his house until it was found there by the police. He was indicted with Joshua Higginbottom; the two prisoners were tried separately, and Joshua was found guilty of a burglary committed in May, 1911. The only evidence against the appellant was that a portion of the stolen property was found in his house in August, 1912. This was not the possession of goods recently stolen so as to throw on the appellant the onus of accounting for his possession; see *Anon.*, 2 C. & P. 459 (1826); *Adams*, 3 C. & P. 600 (1829); and *Cooper*, 3 C. & K. 318; 16 Jur. 750 (1852). Joshua and the appellant lived in the same house at the time of their arrest, but there was evidence that the appellant occupied a different house until November, 1911. The only evidence of possession by the appellant was that the goods were found in a locked box which belonged to Joshua, but of which the appellant produced the key. The Chairman, in his summing up, referred to the evidence given in the trial of Joshua, and made several statements which were not justified by the evidence. He made no reference to the long interval between the burglary and the finding of the goods, and this omission was a serious misdirection.

Cracroft for the Crown. The cases were heard consecutively, and we all proceeded on the basis that the jury were seised of the fact that a burglary had been committed. I cannot defend every sentence in the summing up, but it is probable that the goods came into the possession of the appellant shortly after the burglary. There was no substantial miscarriage.

CHANNELL J.: In this case a good many comparatively small objections have been taken to the summing up. If there had been a really strong case against the appellant and only small inaccuracies in the summing up, it is probable that the Court would not interfere. The real difficulty of the case is that there was no evidence that the appellant was ever in possession of any of the stolen property. It may be that it was found in a box of which he had the key, but there was no evidence that he knew it was there, and property belonging both to the appellant and to Joshua Higginbottom was found there. There was

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therefore no substantial evidence of what was really the root of the case. This was not pointed out to the jury by the Chairman, and his summing up contained several inaccuracies which may have led the jury from the real point in the case, namely, what evidence was there that he knew the stolen property was in his house. This was never put to the jury, and as there was no really substantial case, if the point had been properly put to the jury, they would probably have acquitted him; they certainly would have done so had he been defended by counsel. The conviction must be quashed.

Conviction quashed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CHANNELL, AND MR. JUSTICE AVORY.

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ALFRED CHANDLER.

Going into a house by opening a door with a key is a breaking and entering if the key was knowingly used without lawful authority.

Severity of sentence—A person convicted of an offence for the first time is not necessarily allowed the benefit of the First Offenders Act.

This was an appeal against conviction on a point of law, and an application for leave to appeal against sentence, referred to the full Court by Phillimore J. Appellant was convicted on the 11th October, 1912, at the Birmingham City Sessions, of shop-breaking, and was sentenced to seven years penal servitude.

Hugo Young, K.C. (with him *Joy*), for the appellant, who was not present. The appellant was charged with breaking and entering a pawnbroker's lock-up shop with intent to steal therein. He had asked the pawnbroker's assistant to supply him with the keys of the shop and the safe; acting on the instructions of the pawnbroker and the police, the assistant did so, and the appellant took wax impressions of the keys and had duplicates made; the duplicates were given by the appellant to the assistant to see if they fitted. When the appellant did enter the shop by means of the key, the police were in waiting, and he was arrested before he had time to steal anything. On the authority of *Johnson and Jones*, Car. & M. 218 (1841), there was here no breaking in law. In that case, it is true, the servant actually, by pre-arrangement with the police, opened the door to admit the thief, but the test is whether the breaking was against the will of the master of the house, it is the lack of assent and not the mere physical act which

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constitutes breaking. If the key was given to him to use, and not by an accomplice, using it is not a breaking in law.

[The LORD CHIEF JUSTICE: Is not the test whether the appellant believed he had no lawful authority to enter? See *Lawrance*, 4 Cox C. C. 438 (1850), citing *Eggington*, 2 B. & P. 508 (1801).]

The sentence, if the conviction is to stand, was too severe. This was the appellant's first offence; it is true he said he had outwitted Scotland Yard for some years, and made other remarks which tended to shew that he was one of the criminal classes, but this may have been "bluff" or brag. There had been a burglary in Birmingham where an oxy-acetylene burner had been used, and with practically no evidence to support the suggestion, it was assumed that the appellant had been concerned in that. Inquiries about him had been made in London by the police without result.

J. G. Hurst, for the Crown, was not called upon.

AVORY J.: In this case the question is whether the decision of Maule J., in *Johnson and Jones*, is an authority applicable to it. The facts are clear—that the appellant, with a key, broke and entered the shop of the prosecutor, and that he did it with intent to steal is not disputed. He had done everything necessary to constitute the crime of housebreaking; but it is said that because the servant of the prosecutor furnished him with the means of getting the key, it must be assumed that he did it with the assent of the proprietor, and, therefore, there was no breaking in law; but the proprietor never did assent to his breaking into the premises and stealing the goods. Assuming that the act of the clerk was the act of the owner, the appellant was only allowed possession of the key in order that he might be detected. That did not make the clerk an accomplice. In *Johnson and Jones* the whole decision is to be found in these words: "Under the circumstances of this case the prisoners went in at a door which, as it seems to me, was lawfully open." There was in that case an open door, and, therefore, there was no breaking. Here the appellant had broken open the door with a key, and he was arrested while actually engaged upon the safe. It is sufficient to say that *Johnson and Jones* does not cover the case; the dis-

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tinction has been pointed out. If that case is not in the way, there is no reason for interfering with the conviction.

As to sentence it is said that seven years' penal servitude has been inflicted for a first offence. That expression is very often misunderstood. The First Offenders Act is not intended for the benefit of persons who have for some time lived a life of crime but have not been found out. On his own boast the appellant had defied Scotland Yard for fourteen years; that may not have been true: it may have been said to induce the clerk to lend him the key. If it was not true the appellant must pay the penalty of his own falsehood. If it was told with the object of corrupting the clerk he cannot complain. The police evidently had some reason to believe that he was wholly or partly concerned in another burglary. This was a deeply laid plot to break into the strong-room of a jeweller's shop and to steal valuable jewellery, and the Court sees no reason to interfere.

Appeal dismissed.

Solicitors for the Appellant—*Philip Baker & Co.*, Birmingham.

A. L. B. T.

GEORGE HAROLD WILLIAMS (*a*).

Conviction quashed in view of fresh evidence and of proof that the identification of appellant at the trial was not satisfactory.

For the purpose of identification the suspected person should not be presented alone.

This was an appeal against conviction by leave of the full Court. Appellant was convicted on the 30th October, 1911, at the Chelmsford Assizes, before Lawrance J., of housebreaking, and was sentenced to six months' imprisonment with hard labour.

E. H. Tindal Atkinson for the appellant, who was present in Court. In this case a parcel containing some of the stolen goods was sent off by train, and practically the only evidence against

(*a*) See p. 71, above.

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the appellant was his identification by Fulcher, the booking clerk, as the man who handed in the parcel and addressed the label. A cigarette case, part of the proceeds of the robbery for which the appellant was convicted, was found before the trial near the bed of another soldier named Turner; this fact was not brought out at the trial. Appellant was undefended. Leave has been given to call further evidence.

The appellant was called and examined by *Tindal Atkinson:* I joined the West Yorkshire Regiment in May, 1907, and was transferred to the Army Service Corps in July, 1911. I signed the attestation paper produced. In October, 1911, I was stationed at Woolwich, but on the 13th October I was at Tilbury Fort for a shooting course. We were all searched that evening; I never left the fort all that evening. I was arrested at Woolwich on the 15th October; I was alone and in khaki when I was identified by the station clerk, Fulcher, I did not steal the clothes, razor, or cigarette case; I did not write the label, my initials are G. H., not F. W. as on the label. I never went to the station.

Cross-examined by *G. T. FitzGerald* for the Crown: I saw Driver Halford while I was in the fort on the evening of the 13th October. I made no attempt to get him to give evidence at my trial. I did not know his name.

By the Court: I do not know what station in London you come to from Tilbury.

(By order of the Court witness wrote "Fenchurch Street," "to be called for," and "F. W. Williams"; he spelled "Fencher" or "Fenchur" Street. On the label was "Fencher Street.")

The other prisoners at Chelmsford told me it was no use to appeal unless I had a good excuse or good evidence to call. I left prison on the 29th March, 1912, and communicated with my commanding officer the following week.

Charles Halford, called and examined by *Tindal Atkinson:* I am a driver in the Army Service Corps. I was in the same barrack room as the appellant at Tilbury Fort on the 13th October, Neither of us went out the whole evening. I deserted on the 15th October, and was away for three or four months. I heard nothing of the appellant's arrest or trial until I returned

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Cross-examined by *FitzGerald:* I knew the appellant's name, and I am sure he knew mine. I fix the date by the fact that our kits were searched on that evening.

William Marsh, examined, said: I am a sergeant in the Army Service Corps. I was at Woolwich in October, 1911. On the 18th October the tailors' and shoemakers' shops in barracks were broken into. A search was made on the following day, and a jacket stolen from the tailors' shop and a silver cigarette case were found in a loft opposite the room where a man named Turner slept. The cigarette case was afterwards identified as having been stolen at Tilbury on the 13th of October. The appellant's quarters were at the further end of the passage, fifty yards from the loft.

Cross-examined: The cigarette case was identified and handed to the police before the appellant's trial.

Thomas Sewell, examined, said: I am a driver in the Army Service Corps. I was at Tilbury on the 13th October, and was called on behalf of the appellant at the Grays police court. On leaving the court, Fulcher, the booking clerk, asked if there was another man at Tilbury like the appellant, as he was not sure if he was the man or not.

Cross-examined: I told Corporal Cresswell of this; no one else.

Charles Smith, a driver in the Army Service Corps, corroborated Sewell's evidence, and added that he said Turner was like the appellant.

John Walter Frederick Cahill, examined, said: I am a sergeant-major in the Army Service Corps. In October, 1911, there was a driver in the corps at Woolwich named Frederick William Turner. The attestation paper produced is signed by him. After the thefts in the barracks I asked Turner to write his name; he said he could not write; I shewed him the attestation paper in ordinary handwriting, and he then wrote in printing characters. He was convicted of robbing the bootmakers'

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shop, and bound over at Woolwich, and was discharged from the service. While waiting trial he wrote a letter, which I saw, asking for a character, and that it should be made out in the name of Williams. The letter has been mislaid. The appellant was arrested on the fact that his name was the same as that on the label attached to the parcel in which some of the stolen goods were handed to the booking clerk; there was no identification parade. He had a very good character.

Cross-examined: Turner and the appellant were alike.

Charles Goodchild, detective-sergeant, examined: I know Frederick Turner, he has been convicted several times, sometimes as Turner, sometimes as Frederick Williams.

Tindal Atkinson: At the trial the appellant does not seem to have been given the opportunity of giving evidence, and an inquiry by a juryman as to his handwriting was stopped by the judge. If the evidence called to-day had been heard at the trial, and the witnesses for the prosecution cross-examined on the points raised, it must have produced an effect on the minds of the jury. It is true that the appellant has to-day spelt Fenchurch Street wrongly, and it was wrongly spelt on the label, but the mistake is not the same, and the attestation papers of Turner and the appellant shew that neither of them were good scholars. The jury must have been led to believe that the cigarette case was in the parcel with the other stolen property. If the appellant wrote the label, there is no reason why he should have altered the initials but not his surname. The identification of appellant before trial was not satisfactory.

G. T. FitzGerald, for the Crown: Leave was given to call Fulcher, but he is not here to support the story of Sewell and Smith, both of whom are friends of the appellant; it is curious that they took no steps to assist him beyond telling Corporal Cresswell. The appellant's excuse for not calling Halford at the trial is not borne out by the evidence of the latter. The judge at the trial pointed out the difference between the appellant's initials and those on the label. The grounds on which the Court will quash a conviction on fresh evidence are set out in *Jackson,* 74

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J. P. 352; 4 Cr. App. R. 93 (1910), and this case does not come within them.

The LORD CHIEF JUSTICE: The first point to consider in this case is whether there is a sufficient explanation of the delay in launching this appeal. The appellant was convicted in October, 1911, and was released from prison in March, 1912. During the time he was in prison no steps were taken, but he appeared, from the papers before us, to have communicated with the officers of his corps within a week of his release; they seem to have made considerable inquiries before entering the appeal, and as it appeared to be a case which deserved further investigation, so the Court extended the time in which leave to appeal could be applied for. The appellant served his term of imprisonment without taking any steps, so there cannot possibly be any grounds for suggesting that he is entitled to damages if the conviction is quashed.

It is not without hesitation that the Court comes to the conclusion that, there being no power to order a further investigation, in view of the evidence which has been called to-day, and of the way in which the trial was conducted, this conviction cannot stand. There are several points to be noticed. The case for the prosecution at the trial evidently rested on the identification by Fulcher; this identification was not properly carried out; Fulcher saw the appellant alone in the police station, and did not pick him out from among other men. In the opinion of the Court, the mode adopted was not a proper one, and therefore the identification cannot be said to have been satisfactory. Further evidence has been given to-day, though it is open to some criticism, to the effect that after the police-court proceedings Fulcher had sufficient doubt to induce him to ask if there was another man at Tilbury like the appellant. We have considered whether it would be worth while to have Fulcher called to give evidence, but as we cannot shew him Turner we doubt if he could give much information. On the evidence before us, subject to the curious fact that Sewell and Smith did not mention the matter to anyone except Corporal Cresswell (who was, in fact, the proper person to whom such information should be given), it certainly is doubtful whether the jury would have

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been satisfied that the appellant was the man who handed the parcel to Fulcher.

There is one curious fact which does seem to afford ground for saying that the trial was not conducted as it should have been. The cigarette case was found in a place where it could have been more easily put by Turner than by the appellant, and at the trial the jury may have been under the impression that it was found with the other goods. As a fact it was not found until the 19th October, and in that connection remarkable evidence has been given to-day that, when Turner was asked to write his name, he said he could not write, and when shewn his signature to his attestation paper he wrote it in capital letters. Knowing what we do of Turner's career, there is more evidence that he was the thief of the cigarette case than the appellant. It was suggested that the label is in the appellant's handwriting, but it is curious that he should have put the initials F. W. with his own name, and there is also the fact that W. Williams is the *alias* under which Turner passed. The strongest point against the appellant is the remarkable coincidence between his writing and spelling and that on the label; but, although this raises some doubt, it is not sufficient to overbear the conclusion that ought to be formed from the matters that have been drawn to our attention. In the opinion of the Court this conviction should be quashed.

Conviction quashed.

Solicitor for the Appellant—*Percy W. Taylor.*

A. L. B. T.

RICHARD JAMES McQUEEN.

Severity of sentence mitigated in view of feeblemindedness of appellant.

This was an appeal against conviction and sentence by leave of Channell J., and an application for leave to call further evidence.

Appellant was convicted on the 21st October, 1912, at the Middlesex Sessions, of housebreaking, and was sentenced to twelve months' imprisonment with hard labour.

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RICHARD JAMES MCQUEEN.

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Lawless for the appellant, who was present. The only question in this case is the state of the appellant's mind; I cannot suggest that he comes within the legal definition of insanity, so I do not press the appeal against conviction, but in the circumstances, and having regard to the fact that he was obviously not a professional criminal, the sentence was too severe. The appellant's father was a well-known officer in the City police, and on his death the appellant went to an orphanage school, where he had a distinguished career; in 1900 he went to Germany, where he taught English at the Berlitz school. On his return to England in 1905, all his friends noticed a great change in his demeanour; he has had various situations, but has lost them owing to his eccentricities. I ask leave to call a witness to prove this The appellant's mother has been in a lunatic asylum for the last twenty-six years.

Robert Loch Faulkner, called and examined by *Lawless,* gave evidence in support of the above statements.

Roderick for the Crown.

CHANNELL J.: In this case the appellant is one of those persons who give judges most trouble when dealing with the question of sentence; he is a person of obviously weak mind. This came out at the trial sufficiently for the jury to ask about it, and they were told it was not a matter for them to consider, and there is no ground for suggesting that he is anything more than obviously somewhat weak-minded. He committed what is an offence at law, unless it is established on his behalf that he was insane so as not to know the nature and quality of the act he was doing, and there is no reason to say that. After conviction, Dr. Dyer gave evidence, and said that in his opinion the appellant was responsible for his actions, but something was said about him that is almost equivalent to what his friend has said to-day. He ransacked the place into which he broke, put on some clothes which were there, and was found in the place asleep. It was obviously not the usual professional burglary. The jury could not well help convicting him, and the Court cannot interfere with the conviction. As to the sentence, there is great difficulty. There is now a bill before Parliament which, if it becomes an Act,

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will, we hope, enable such persons as the appellant to be suitably dealt with. At present it is only possible to take the matter into consideration in fixing the sentence. The Court thinks that a sentence of twelve months' imprisonment with hard labour which was passed by the Chairman, as he said, in view of the fact that there had been other burglaries in the neighbourhood, ought not to be passed on a man such as the appellant. The sentence will be reduced to six months' imprisonment with hard labour, to run from the date of his conviction.

Sentence reduced.

Solicitor for the Appellant—*Percy W. Taylor.*

A. L. B. T.

CHARLES COOK.

If, on an indictment for receiving stolen property, the Court thinks there was evidence from which the jury might infer guilty possession, it will not quash a conviction, though there was not (as there should have been) a direction on the point to the jury.

This was an appeal against conviction for larceny by leave of Channell J., and against sentence. Appellant was convicted on the 23rd October, 1912, at the County of London Sessions, of larceny and of being a habitual criminal, and was sentenced to three years' penal servitude, and five years' preventive detention.

Roome, for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant in this case was convicted of feloniously receiving a bicycle, and the ground of the appeal is that there was no evidence that he ever received, or was in possession of the bicycle. The evidence shewed that it remained all the time in the exclusive possession of the thief, a man named Tompkins, who pleaded guilty and was called for appellant. The bicycle was stolen on the 29th July, 1912, and on the 3rd August, Tompkins asked the appellant to sell it for him. The appellant first offered it to one Selby, and then to a man named Owen, the price suggested being £1. Owen asked to be

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allowed to see the bicycle, and the appellant fetched Tompkins, who went away to get the bicycle, appellant waiting near Owen's shop. In half an hour Tompkins returned with the bicycle, met the appellant a few yards from the shop, walked with him thither, went in alone, sold the bicycle to Owen for £1, and gave the appellant, who was waiting outside, a shilling. Where the exclusive possession of a stolen article remains in the thief no one else can be convicted of receiving. *Ashworth*, 6 Cr. App. R. 112 (1911). In *Wiley*, 2 Den. C. C., T. & M. 367; 20 L. J. M. C. 4; 15 Jur. 134; 4 Cox C. C. 414 (1850), the conviction was quashed, although the facts were much stronger against the prisoner than they are here. See also *Hill*, 1 Den. C. C. 453; 3 New Sess. Cas. 348; T. & M. 150; 2 Car. & K. 978; 18 L. J. M. C. 199; 13 Jur. 545; 3 Cox C. C. 533 (1849). No direction was given to the jury on the question of possession; the Deputy-Chairman in his summing up said, "No doubt the prisoner was dealing with the bicycle," which begged the question at issue. The jury were directed that the sole question for their consideration was whether appellant knew that the bicycle was stolen.

[CHANNELL J.: Was the indictment drawn so that he could be convicted as an accessory after the fact?]

No, it was the ordinary indictment for larceny and receiving.

[CHANNELL J.: Is there anything but a technical question of what he should be convicted?]

Beaumont Morice for the Crown. *Payne*, 3 Cr. App. R. 259 (1909), where the facts were very similar to those here, covers this case. The question of possession is for the jury to decide on the facts proved in evidence; the conduct of Tompkins and the appellant was evidence that they were acting together and were in joint possession of the bicycle, and the jury were directed to consider their conduct.

Roome: The appellant was undefended at the trial, and unless the case was properly proved against him, there has been a miscarriage of justice. When can it be said that he received the bicycle?

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AVORY J.: The only question in this case is whether there was any evidence of the appellant being at any time in possession of the stolen bicycle. Of course, if there was no such evidence, it would be the duty of the Court to quash the conviction, and no question would arise as to the direction given to the jury. If there was any such evidence, the further point is taken that no direction on the question of possession was given by the Deputy-Chairman. In the opinion of the Court there was evidence here on which the jury might come to the conclusion that the two men were in joint possession, the appellant taking a leading part in the arrangements for disposing of the bicycle. It is a fact that there was no specific direction on the subject, but the Court thinks that the question whether the appellant ever had possession jointly with the thief was amply before them; the appellant in his evidence said that the bicycle was never in his hands. The Court thinks there has been no miscarriage of justice, and the appeal therefore fails.

Appeal dismissed.

A. L. B. T.

ARTHUR ENTWISTLE.

Severity of sentence.
The infliction of flogging should diminish a term of penal servitude, part of the same sentence.

This was an application for leave to appeal against conviction. Appellant was convicted on the 17th of October, 1912, at the Central Criminal Court, before Horridge J., of attempting to choke with intent to commit an indictable offence, and was sentenced to three years' penal servitude, and (under 26 & 27 Vict. c. 44, the "Garrotters" Act, 1863) to fifteen strokes of the "cat."

No counsel appeared; the applicant was not present.

THE LORD CHIEF JUSTICE: This is a most terrible case. A little girl, under eight years of age, was nearly choked, and was

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grievously assaulted by some one. She was rendered insensible and therefore could not give an account of everything that happened, but her story was corroborated in a remarkable way by a boy. The defence was that the assault must have been committed during the prisoner's absence, but we are not surprised that the jury did not believe it. The prisoner was sentenced to three years' penal servitude, and fifteen strokes of the cat, and he does not appeal against sentence. As far as the sentence of penal servitude is concerned, no one can reasonably suggest it is too severe, and if the other part of the sentence had not been inflicted no doubt a longer term of penal servitude would have been imposed.

Application dismissed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE AVORY.

WILLIAM CHARLES ADOLPHUS BEAL.

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Murder—An omission by the judge to call attention to a slight discrepancy between a witness's evidence at the trial and that at the coroner's inquisition is not misdirection.

This was an application for leave to appeal against a conviction for murder. The appellant was convicted at the Central Criminal Court, on November 11th, 1912, before Phillimore J., and was sentenced to death.

Lister Drummond for appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appeal is based on three grounds. First, that the judge omitted to call the attention of the jury to the fact that the evidence of two girls called for the prosecution was untrustworthy, in that it was inconsistent with the evidence which they had given at the coroner's inquest. The appellant's defence was that the deceased—his sweetheart—had committed suicide, and had also cut his throat: his throat was, in fact, cut in one place, hers was cut in three. The two girls swore at the trial that the appellant had the razor in his hand; they did not say so before the coroner I will read their evidence at the inquest and at the trial, and I have here the newspaper report. [The Court declined to receive the latter, stating that it had all the shorthand notes.] The second point is that the judge elicited from the appellant that he had previously been charged with attempted suicide. I cannot press this point, as the shorthand note shews that the suggestion of a previous attempt at suicide first came from appellant. The third point is

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that the judge misdirected the jury as to the appellant's defence. He should have told them that they might accept the appellant's story if it was reasonably possible: he in fact told them that it must be reasonably probable. I may cite *White*, 4 Foster and Finlason, 383, footnote (1865). The headnote is: "In a criminal case the jury, in order to convict, ought to be satisfied by the evidence, affirmatively, as a conviction created in their minds beyond all reasonable doubt, that the guilt of the prisoner is established, and, if there is only an impression of probability, they ought to acquit him. And, so far as the case rests on direct testimony they should, if there be any circumstances to impeach the credibility of the witnesses, look carefully to those circumstances as elements of doubt in the case," *per* Martin B.

[The LORD CHIEF JUSTICE: The late Mr. Finlason took a strong view of Pollock C.B.'s direction to the jury in *R.* v. *Muller* (1864), and the footnote to *White* is his criticism of that direction.]

I say that the jury ought to have been directed on the reasonable possibility in this case of appellant's explanation being true.

Bodkin (*Cecil Whiteley* with him), for the Crown, was not called upon.

The LORD CHIEF JUSTICE: The Court cannot interfere in this case. On the first point the judge did in fact point out the differences in the stories told by the two girls. Mr. Drummond cross-examined them, and he asks the Court now to say that the judge should have criticised their evidence more adversely. The judge's summing up is quite correct; he laid down quite clearly both at the beginning and at the end of his summing up that the onus of proof was on the prosecution. The real position at the trial was this: the deceased was found with three cuts in her throat, which it was highly improbable, according to the medical evidence, she could have caused herself; the appellant had one wound in the throat, which was, in the doctor's opinion, self-inflicted. The appellant's defence was

that the girl had struck him with the razor, and had then committed suicide. The jury had to decide which story was true.

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Application dismissed.

B. W. B.

FREDERICK TREVARTHEN.

The general rule that witnesses who might have been called at the trial and were not will not be called in the Court above will be enforced with strictness when the defence is an alibi *and appellant reserves his defence before the justices.*

This was an application for leave to appeal and to call further evidence. The appellant was convicted at the Bodmin Assizes, on October 29th, of having carnal knowledge of a girl under sixteen years of age, and was sentenced by Bucknill J. to six months' imprisonment with hard labour. The appellant, when before the justices, was defended by a solicitor, and he reserved his defence. The defence set up at the trial was an *alibi*.

L. C. Thomas for the appellant, who was not present. The alleged date of the offence charged was 20th March. The appellant was not arrested until 9th September; he stated that he was playing football during the material hours on that day, but as five months had elapsed he could not immediately identify the particular day. He subsequently referred to his fixture card, and so established the date. I desire to call further evidence from other members of the football club who were playing on the 20th March.

[DARLING J.: It is dangerous when there are several witnesses to an *alibi* only to call one, and then to turn round and say, "there were more who could be called."]

The witnesses he now proposes to call were not called at the trial because appellant mistakenly supposed that their attend-

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ance would involve him in expense, which he was unable to afford. When appellant was cross-examined at the trial, he was asked why certain members of the football team were not invited to give evidence in support of the *alibi*, and it is those players who are now proposed as witnesses. If, after hearing their evidence, the Court is of opinion that the jury would have had a reasonable doubt as to the appellant's guilt if they had been called in the Court below, the appeal ought to succeed.

The LORD CHIEF JUSTICE: The Court cannot give leave in this case. During the four years for which this Court has been established, it has constantly pointed out how unwise it is for a prisoner, when before the justices, to reserve his defence; and on two or more occasions the Court has especially commented on the folly shown in not setting up an *alibi* at the earliest possible opportunity, for an *alibi*, if established, is a perfect defence. The prisoner in this case was on bail, and he knew the names of the witnesses whom he now desires to call. In such a case the Court will always require some satisfactory explanation why the witnesses were not called at the trial. The prisoner says that he could not afford to pay the expenses of any more witnesses, but if these witnesses had been called before the justices, the county would have borne the expenses of their attendance at the assizes. The *alibi* was before the jury, and they did not accept it.

Application dismissed.

B. W. B.

Solicitors for the Appellant—*Walker & Rowe*, for *William Rowe*, Redruth.

ALBERT HERION.
JOHN JACKSON.
LEWIS WILKIN.

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A second offence against the Vagrancy Act, 1898 (61 & 62 *Vict. c.* 39), *makes the offender "an incorrigible rogue" within s.* 5 *of the Vagrancy Act,* 1824 (5 *Geo.* 4, *c.* 83), *and so liable to punishment under s.* 10 *of the latter Act.*

These three cases had been referred to the Court by the Home Secretary, under s. 19 of the Criminal Appeal Act. The three prisoners had been convicted as incorrigible rogues for a second offence under the Vagrancy Act, 1898, s. 1 (*b*), and had been sentenced, at the London County Sessions, on November 5th, 1912, to nine months' imprisonment with hard labour and twenty-five strokes of the birch. They petitioned the Home Secretary against the latter part of this sentence.

Percival Clarke for the appellants (under s. 10 of the Criminal Appeal Act), who were not present. The flogging is an illegal sentence. He referred to the Vagrancy Act, 1824, 5 Geo. 4, c. 83, ss. 3, 4, 5, 10, amended by the Vagrancy Act, 1898, 61 & 62 Vict. c. 39 (cited below); *Johnson*, [1909] 1 K. B. 439; 78 L. J. K. B. 290; 100 L. T. 464; 73 J. P. 135; 22 Cox C. C. 43; 53 S. J. 288; 25 T. L. R. 229; 2 Cr. App. R. 13, is the converse of this case, and indicates how strictly the Act of 1824 should be interpreted; *W. J. Brown*, 1 Cr. App. R. 85; 72 J. P. 427 (1908), is an authority for this Court entertaining an appeal against this sentence. A sentence of twelve months' hard labour and a whipping can only be inflicted under s. 10 of the 1824 Act on persons found to be incorrigible rogues under s. 5 of that Act. An incorrigible rogue is a person who has been convicted more than once under s. 4 of that Act as a rogue and vagabond. The appellants were convicted under the Act of 1898, which carries with it the punishment provided by s. 4 of the 1824 Act, but does not make the offence an offence under that section. A second conviction does not, therefore, render the offender an incorrigible rogue within s. 5, nor amenable to the sentence laid down in s. 10 of the Act of 1824. The Act of 1898 is not expressed to be "read as one" with that of 1824, although it is an amending Act.

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Comyns Carr, for the Crown, was not called upon.

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The LORD CHIEF JUSTICE: There is no doubt about this case. The appeal is against the flogging; but if counsel's argument as to that is right, the sentence of nine months is also bad.

The Act of 1898 created two new offences, in addition to those specified in s. 4 of Act of 1824.

By s. 1, sub-s. (1): "Every male person who—

(a) Knowingly lives wholly or in part on the earnings of prostitution; or

(b) in any public place persistently solicits or importunes for immoral purposes,

shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly."

The Act of 1898 inflicts no punishment; all that is contained in the 1824 Act, which deals with first offenders in s. 3, and with second and subsequent offences in ss. 4, 5 and 10. A person who commits one offence under s. 1 of 1898 Act, is deemed to be a rogue and vagabond, and may be dealt with as such under the earlier Act. It therefore follows that when he commits a second he is an incorrigible rogue.

Appeals dismissed.

B. W B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PHILLIMORE, AND MR. JUSTICE AVORY.

WILLIAM WALLACE GALBRAITH.

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Murder.

Drunkenness is not a good defence unless it can be positively proved that it was of such a nature that the accused did not know the difference between right and wrong.

This was an application for leave to appeal against conviction. Appellant was convicted on the 20th November, 1912, at York Assizes, before Pickford J., of the wilful murder of Mary Galbraith, and was sentenced to death.

Rowan-Hamilton for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant married the deceased woman on the 9th April, 1912, and she left him on the 3rd August; this preyed on his mind, and he had both before and after marriage given way to drink; my submission is that, in the circumstances, the verdict ought to have been one of manslaughter. On the 13th August the appellant's wife returned to him, and all their quarrels seem to have been forgotten, but on the following morning the appellant cut his wife's throat with a razor. Heavy drinking can, I submit, bring on a condition bordering on *delirium tremens*, and there was evidence that he was almost in that condition on the night before the murder. Acute mania may have arisen suddenly, and the appellant may have been under an influence so strong that he was unable to resist it. Medical evidence was given to the effect that acute mania, when it arises, generally causes an act of violence, and, that act perpetrated, a return to ordinary sanity supervenes. I endeavoured to ask the jury to infer that such acute mania had arisen in this case, but

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the judge refused to allow me to address the jury on the question, he said that. if there had been such acute mania, the verdict ought to be guilty of murder, but insane. My suggestion was that such a state of mind would negative intention and so make the proper verdict one of manslaughter. The facts, with this submission, ought to have been put to the jury.

Lowenthal and *A. H. Marshall,* for the Crown, were not called upon.

The LORD CHIEF JUSTICE: In this case the Court is of opinion that there is no ground for interfering with the verdict. The appellant had threatened his wife on previous occasions, and he was evidently quite conscious of what he had done, for he made two admissions that he had killed her; his conduct was actuated by his feelings against her. There was practically no evidence that he was in such a condition as would have justified a verdict of manslaughter. Three persons gave evidence that he was not the worse for drink on the previous night, and the crime took place early in the morning when he was perfectly conscious. It is impossible to hold that he was under the influence of drink sufficient to justify any other view than that taken by the jury. Counsel asks the Court to hold that there was a sudden acute mania caused by drinking. The Court is obliged to concur in the view expressed by the judge that there was no evidence to shew that the appellant at any time did not know the difference between right and wrong. The facts were not in dispute, and there is no ground for granting leave to appeal.

Application dismissed.

A. L. B. T.

MARY ANN GASKELL.

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Fresh evidence.

When on an indictment for perjury containing several assignments a general verdict of guilty is returned, though one assignment is clearly not proved by reason of the want of corroboration, the Court will quash the conviction.

The Court will not set aside a verdict merely because the trial judge is dissatisfied with it.

This was an appeal against conviction on the certificate of Bankes J., who tried the case, and an application for leave to call further evidence. Appellant was convicted on the 8th November, 1912, at the Swansea Assizes, of perjury. Sentence was postponed.

Wilfrid Lewis for the appellant (under s. 10 of the Criminal Appeal Act), who had been granted bail. In June, 1907, one Elizabeth Ann Larsen obtained a separation order from her husband, under which she had the custody of the children of the marriage, and received 12*s.* 6*d.* weekly. She took in lodgers, and in 1909 a man named James Wilson came to lodge with her. In January, 1912, the appellant and her husband came to lodge; they occupied a ground floor room, while upstairs there were two rooms only, one of which was occupied by Wilson and the other by Mrs. Larsen, who slept in the same bed as her three children. On the 20th April, 1912, there was a disturbance in the house, which resulted in the police being called in, and a summons was issued against the appellant, but dismissed. As a result the Gaskells left the house. On the 22nd April Larsen took out a summons to quash the order for maintenance on the ground of his wife's adultery with Wilson. On the 6th May, on the evidence of the appellant, the magistrate quashed the order for maintenance, and gave Larsen the custody of the children. The suggestion made by the prosecution was that the appellant's evidence was false, and that between the 20th and 22nd April she had gone to Larsen and told him a concocted story, her motive being her quarrel with Mrs. Larsen.

The assignments of perjury in the indictment were shortly that the appellant had sworn that since Christmas she had gone upstairs with a letter for Mrs. Larsen, that she had

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knocked at Wilson's door, and the door had been opened by Mrs. Larsen in her night attire, and that she had seen Wilson in bed reading; that Mrs. Larsen had told her that she had had a miscarriage, and was afraid that Wilson was the father, and that she had been living with Wilson for a long time. The appellant at the trial admitted that she had made these statements, but said they were true. In my submission the evidence for the Crown was very unsatisfactory, and had it not been for the question of motive, which was strongly emphasized, the jury could not have convicted. I now ask for leave to call evidence that the appellant gave information on the subject to Larsen on the 2nd or 3rd April, nearly three weeks before the quarrel arose. The reason these witnesses were not called at the trial is that I did not know of their existence, except Gaskell's, and I did not then know that he could give evidence on this point.

Leave was given to call further evidence.

Laurence John Larsen called and examined by *Lewis:* On the 22nd April, 1912, I took out a summons against my wife on information given to me by the appellant and her husband. The appellant came to see me on the 3rd April and told me she had found my wife in her nightdress in Wilson's room.

Cross-examined by *A. S. Comyns Carr* for the Crown: I did not take out the summons earlier because, owing to the coal strike, I had no money; I took it out as soon as I started work again. The appellant came to see me again on the 20th April, and went with me to my solicitor. She only repeated the same story.

Mary Broome, examined, said: Larsen lodged with me during the first six months of this year. I was present at the interview between him and the appellant on the 3rd April.

Cross-examined: Mr. Gaskell came to see Larsen first; that was on the 1st April. I heard of the quarrel between Mrs. Larsen and the appellant after the latter came to my house. She said that the row was owing to her having given information to Larsen.

James Gaskell, examined: I am the husband of the appellant. I gave information to Larsen on the 1st April that Wilson was

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fond of Mrs. Larsen. I think my wife went on the 3rd April.

Cross-examined: Larsen did not tell me that he meant to take proceedings.

By the Court: Mrs. Larsen for weeks carried up food to Wilson in bed. I could not tell Larsen sooner because I did not know where he lived; Mrs. Larsen gave me his address.

Lewis: The summons for perjury was issued about the 16th July. The judge in his summing up dealt with the question of motive. The only evidence against the appellant was that of Mrs. Larsen, one of her children, and Wilson. It was proved and admitted by both Mrs. Larsen and Wilson that the latter had allowed his name to be used for the purchase of some furniture for Mrs. Larsen's house on the hire-purchase system; another suspicious circumstance was that when the proceedings for quashing the maintenance order were before the magistrate neither Mrs. Larsen nor Wilson appeared; her excuse was that she was ill, but the police court is not far from her house, and a tram would have taken her the whole way; motive is the only thing that could have outweighed these suspicious circumstances.

The judge gave the jury no direction as to what constitutes perjury, or as to what were the particular assignments of perjury in this case; unless the jury believed Wilson, there was no corroboration of Mrs. Larsen's evidence.

Comyns Carr for the Crown: The case was amply before the jury, and nothing has been shewn to-day to justify this Court in interfering with their verdict. As to the evidence given to-day, there was an interval of three weeks between the time that the appellant says she gave information to Larsen and the taking out of the summons; the explanation of the delay is not satisfactory. The summing up in its treatment of facts is strongly in favour of the appellant; it is true that the judge did not go in full detail into the ingredients of the offence, but looking at the actual charges made, the question of falsity to the knowledge of the appellant could hardly arise. The judge directed particular attention to the question whether Mrs. Larsen was sleeping in Wilson's room; on that issue the criticism cannot apply; there was no room for mistake; the appellant either saw Mrs. Larsen there or she did not. In *Parker*, 6 Cr. App. R. 285 (1911), a

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conviction was quashed on the opinion of the judge at the trial that the conviction was wrong, although it was not suggested that there was not evidence on which the jury could convict, or that there was any misdirection.

[THE LORD CHIEF JUSTICE: In that case the whole question turned on the identification of clothes, and there was strong evidence that the appellant was not the criminal.]

Lewis, in reply.

AVORY J.: The appellant in this case was convicted of perjury, and the judge has certified that it was not a satisfactory conviction; he certifies that, in his opinion, the jury were probably influenced by considerations that ought not to have influenced them. One consideration was the suggestion that the appellant had made an accusation against Mrs. Larsen, the prosecutrix, of adultery with Wilson, and had done that out of spite in consequence of a quarrel which occurred between them at Mrs. Larsen's house. At the trial, beyond the evidence of the appellant herself, there was no evidence that she had ever made any communication to Larsen on the subject of the alleged adultery before her quarrel with Mrs. Larsen at the latter's house, and the judge in his summing up undoubtedly told the jury not to attach too much importance to that suggestion. We have had further evidence on this point to-day tending to shew that the appellant had some time before the quarrel communicated her suspicions or her knowledge to Larsen. The Court does not propose to found its judgment on this additional evidence, nor does it rely solely on the certificate or opinion of the judge. It is obvious that when a case is one proper for the consideration of the jury, and the jury being properly directed, convict, the mere opinion of the judge that he would have found the other way, or that the verdict was not satisfactory, is not a sufficient ground for quashing the conviction. But we have had to consider whether the judge at the trial gave a sufficient and proper direction as to what is necessary for the prosecution to establish on a charge of perjury. It may well be that, having taken the view he did on the merits of the case, he did not think it necessary fully to call the attention of the jury to its legal aspects; he obviously anticipated an acquittal.

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Turning to the summing up, it seems clear that there is not to be found in it any direction to the jury as to what constitutes the offence of perjury, the important distinction between perjury and a mere statement of something which turns out to be untrue, nor as to the necessity, before convicting, that the jury should be satisfied that there is more than oath against oath, and that on each assignment of perjury corroboration is required. In this case there were several assignments of perjury; it is not necessary to read them, but one is an assignment that the appellant asserted that Mrs. Larsen had told her that she had had a miscarriage, and that Wilson was the father. On that assignment it is clear that there was no evidence contradicting the assertion of the appellant except the evidence of Mrs. Larsen herself. The verdict was a general verdict on the whole indictment, and it is impossible for the Court to tell whether the jury found each assignment proved, or one only and not the others, or found this particular one proved. If they did, their verdict cannot stand, because there was no sufficient evidence to support it. Having regard to these considerations, the Court comes to the conclusion that the verdict cannot stand, and that the conviction must be quashed.

Conviction quashed.

Solicitor for the Appellant—*W. Godfrey Phillips*, Pontypridd.

A. L. B. T.

HARRY EDMUNDSON.

Retaining goods sent on the faith of a promise to pay for them on delivery may amount to larceny by a trick.

This was an appeal against conviction by leave of Scrutton J. Appellant was convicted on the 29th October, 1912, at the Liverpool County Sessions, of larceny, and was sentenced to six months' imprisonment with hard labour.

E. J. Rimmer for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant went to Marshall, a tailor in Southport, on the 20th June, 1912, and asked him to

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make him a suit of clothes; on the 24th June he was fitted; on the 27th June he saw the clothes completed, and asked Marshall to send the clothes to him as he had forgotten his purse, and he would pay on delivery. They were delivered, but he never did pay for them.

My first submission is that there was no larceny of the clothes. By the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 18, rule 2, "Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof"; the property therefore passed to the appellant on the 27th June before any conditions were made for payment. Even if the tailor had still an unpaid vendor's lien on the goods, this would not be enough to support a charge of larceny.

[AVORY J.: The same point was overruled in *Slowly and Humphrey*, 12 Cox C. C. 269; 27 L. T. 803; 1873; C.C.R.]

In that case the jury found that fraud had been meditated from the beginning; there is no such finding here.

Secondly, evidence was wrongfully admitted of another charge against the appellant; it was suggested that he had tried to get another suit of clothes in a similar way. It is true that the answer was given by the appellant, but it was forced from him in cross-examination. He had said that a Miss Crosby had promised to pay for the clothes, and the questions were admitted because that lady's character was said to have been assailed, but she was not a witness in the case, and therefore the questions were not admissible under the Criminal Evidence Act, 1898, s. 1 (f) (ii). If necessary, Miss Crosby could have been called by the prosecution to rebut the appellant's evidence.

Lastly, the Chairman misdirected the jury; he never explained the charge to them, but only read over the evidence for the prosecution. The question as to whether there was any *animus furandi* was never put to the jury, and he assumed that no credit was given to the appellant; this was one of the questions the jury had to decide. I drew the Chairman's attention to the point at the end of the summing up, and he corrected himself, but by

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then the jury had been considering their verdict for some minutes, and the mischief was done. I ask leave to have Miss Crosby called to give evidence to the Court.

A. S. Comyns Carr, for the Crown, was not called upon.

PHILLIMORE J.: In this case the appellant was convicted of obtaining a suit of clothes by larceny by means of a trick. The evidence of the tailor was not shaken, and was not contradicted except on one point which had never been put to him. His evidence was that he thought it worth while to have the suit cut out on credit, but that he never intended to part with the clothes on credit. The tailor, without parting with the property, sent the clothes by his son. The son's evidence was that he shewed the appellant the bill, who took it, took the clothes, put them down on a slab, and then shut the door in the boy's face.

The first point taken is that under the Sale of Goods Act, 1893, the property passed when the clothes were tried on by the appellant, but there is not the slightest foundation in fact to support that suggestion. Then counsel hardly takes the point to-day that supposing the property in the goods remained in the tailor there was still no larceny; had it been elaborated it would have been easy to shew that there was a direct taking of the goods against the will of the tailor, if not that of his son; in any case there was larceny by means of a trick.

Then it is said that evidence was wrongfully admitted. We do not quite like the way counsel for the prosecution at the trial mixed up assertions of fact with questions to the appellant, but it was a way of putting to him whether he had not obtained other goods in a similar manner, and then put forward the excuse that Miss Crosby would pay for them. In any case the objection was not insisted on before the Chairman.

The last point raised is that the Chairman misdirected the jury; he put the point quite correctly in the opening of his summing up, but at the end he slipped into a not unnatural mistake, which, however, he corrected at the request of the appellant's counsel.

Then the appellant wants to make out a better case by calling

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Miss Crosby, who was not called as a witness at the trial, and as to whom no questions were asked. The Court is of opinion that no reason has been shewn for interfering with the conviction, and the appeal must be dismissed. The sentence may run from the date of conviction.

Appeal dismissed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE COLERIDGE, AND MR. JUSTICE ROWLATT.

GEORGE BROOKS.

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Severity of sentence.
A convicted prisoner ought to have an opportunity of challenging evidence as to his past life. Such evidence must not influence sentence unless it is strictly proved.

This was an appeal against sentence, by leave of Bucknill J Appellant was convicted on the 27th November, 1912, at the Essex Sessions, of burglary, and was sentenced to ten years' penal servitude.

Stanley R. Crawford for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant pleaded guilty to breaking into three houses at a period when he was released on licence, and the first ground of his appeal is that the Chairman heard a very damaging statement by a detective, the most damaging portion probably being an allegation that the appellant had said he had committed forty-two burglaries since September, and sixteen on one night. Such a statement should not be taken seriously, and the appellant was given no opportunity of cross-examining the detective, nor was he called on after this.

Secondly, although it is true that the appellant had previously received sentences of five and six years' penal servitude, on the other hand the detective confirmed his statement that since his last release from prison he had done honest work at the docks during the strike; he only gave it up because he was twice

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assaulted as a blackleg. He said that when he committed the burglaries he was in a state of utter destitution.

Lastly he had given every assistance to the police, which had enabled all the property, which was of small value, to be traced and restored to the owners.

St. John Morrow for the Crown. It does appear that the prisoner was called on at the wrong place, and it might have been better if he had been called on again; but the detective had made similar statements before the magistrates and had not been challenged. In any case it seems certain that he had committed more than the three burglaries to which he pleaded guilty.

The LORD CHIEF JUSTICE: In this case the punishment is very severe. No doubt the appellant had an extremely bad character, as is shewn not only by his previous convictions, but by the fact that a complete set of burglar's instruments was found on him, and that he had committed many crimes in the short time since he had been released from prison. A detective gave a detailed account of the offences which he was supposed to have committed, some of which were undoubtedly true, but some of which ought not to have been taken into account unless they were admitted by the appellant. There is one further fact, which shews that the police gave their evidence fairly—namely, that the detective said he had been working honestly for a time. The Court considers that the large number of burglaries committed necessitated exemplary punishment, but still, that ten years' penal servitude is too long a term, and reduces it to six years' penal servitude, to run from the date of conviction.

Sentence reduced.

A. L. B. T.

FRED PROBETS.

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On an indictment for carnal knowledge on a given date, the jury must be distinctly directed to disregard any evidence of a similar offence on another date which may have been given.

Whether such evidence may be given in respect of an occasion not within the statutory period of six months prescribed in the second proviso of s. 5 of 48 & 49 *Vict. c.* 69, *the Criminal Law Amendment Act,* 1885, *as amended by* 4 *Edw.* 7, *c.* 15 (*the Prevention of Cruelty to Children Act,* 1904), *s.* 27, quære.

This was an appeal against conviction on a point of law, and an application for leave to appeal against conviction on fact, and against sentence. Appellant was convicted on the 26th November, 1912, at the Leeds Assizes, before Bailhache J., of carnal knowledge of a girl under sixteen years of age, and was sentenced to twelve months' imprisonment with hard labour.

C. Mellor for the appellant (under s. 10 of the Criminal Appeal Act) who was present. A remarkable feature of this case was that the appellant was first charged with regard to an offence on some date between the 4th and 19th April, 1912; as this charge was made on the 19th October, such an offence would have been outside the statutory period of six months. The hearing before the magistrates was adjourned for a week, and the date of the alleged offence then altered to the 6th May, as to which date the defendant was able to call witnesses to an *alibi*. At the trial Mr. Fleming, who appeared for the prosecution, endeavoured to go into the alleged offences between the 4th and 19th April; I objected, and my objection was upheld by the judge. Shortly afterwards, however, the father of the prosecutrix was examined by Mr. Fleming as to a conversation he had had with the appellant, and said, "I asked him if he know a girl at Sidall called Doris Flather; he said 'Yes,' so I told him she had been ill, and we had had her examined by a doctor, and he told her she was pregnant, and I told him she blamed him for it, and he said, 'It is not me,' and I says, 'Have you ever been with her?' and he says 'Yes'; so I then says, 'Was you with her at Easter?' and he say 'No'; and I then asked him if he was with her on Good Friday. He studied a bit, and I reminded him of the Sidall Baptist Chapel being lit

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up, and he says, 'Oh, yes, I was with her that night.' So then I asked him if ever he had had connections with her, and he says 'Yes,' and he started crying, and he said, 'If I have done that I will put my head under it before morning; I won't be living.' I asked him how long was it since he was with her, and he said it was not three months since he was with her." I did not object to this because before I could do so the mischief was done. The appellant's statement was not necessarily an admission of an offence within the six months; it depends on the meaning of the words "with her."

Evidence was called to establish an *alibi;* it is true that evidence had not been called before the magistrates, but that was owing to the fact that a different date had first been suggested. It was proved that the appellant, who was a Territorial, was present at a drill hall at 8 p.m., and that the drill lasted till between 9 and 9.30 p.m. A book was produced in which he was marked as present on the 6th May, at 8 p.m. The drill was followed on that night by a boxing competition, in which considerable interest was taken, and two witnesses stated that he stayed to watch it. If he was there all that time he could not have committed the offence. The judge was evidently impressed with the defence, and he opened his summing up by pointing out to the jury that they had only to direct their attention to the fact whether an offence had been committed on the 6th May, and then said, "It is not denied that the prisoner had at some time or other connection with this girl. He has confessed that he had to one of the witnesses who was called, and the prisoner has not been called before you to deny that confession, and therefore that confession stands." I submit that suggestion was not justified; if the evidence appeared to establish the *alibi,* that might be a sufficient reason for not putting the appellant in the witness-box. Then later he said, "Now, there is only one other thing that I want to say. The prisoner knows as well as anybody else, and perhaps better, what he was doing on the 6th May, but he was not called into the box. Gentlemen, as a rule I should attach the very greatest importance to that fact, but I think it only fair to say in the prisoner's favour in this case that I can well understand why he was not called into the box, because he admits that on other dates earlier than the 6th May he did have connection with this girl, and I suppose

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that that is the reason why, or a principal reason why, he was not called into the box in this case." While the judge, of course, had power to comment on the fact, I submit it was going too far to suggest reasons why the appellant was not called. Probably the judge meant to help the prisoner, but in my opinion these remarks prejudiced him. The girl was pregnant, and the jury may not have known that bastardy proceedings could be instituted against the appellant even if they acquitted him; they probably looked on the question of date as a technical matter which they could disregard.

[ROWLATT J.: If the appellant had in evidence only denied having committed the offence on the 6th May, could he have been cross-examined as to previous acts of connection?

LORD COLERIDGE J.: Yes; because the six months having elapsed, it was not an offence.

The LORD CHIEF JUSTICE: I doubt whether he could have been cross-examined on the point.]

The verdict was against the weight of the evidence. The girl's brother gave evidence corroborating her story that she was with the appellant on the 6th May, but speaking in November to an event which happened so long before, he may well have been mistaken. He fixed the date by saying that he had a pencil behind his ear on that evening which his sister tried to snatch, and in the scuffle it was lost, and that his aunt wore a new dress that evening. These events do not fix the date in any way.

The sentence was too severe. The judge said that the girl was ruined for life; happily for her it is not the case in the north; many a girl who has an illegitimate child marries and lives happily with her husband. Further, the appellant, who is only a lad, will probably receive additional punishment in the shape of a bastardy order against him.

S. Fleming for the Crown. The case opened was of 6th May and the evidence in chief was of 6th May. I do not agree with my friend that if the appellant was at the drill hall on the 6th May he could not have committed the offence. The hall was only twenty

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minutes' walk from the place where the girl alleges she met the appellant, and whether he stayed after the drill to watch the boxing depends on the accuracy of the recollection of two witnesses. The subject of offences in April was only introduced by Mr. Mellor's cross-examination, and I then warned him that if he cross-examined as to the offence having been originally laid in April, I should be entitled to ask what did take place then. If the case had been fought solely on the *alibi*, the matter would never have been introduced. The judge directed the minds of the jury to the essential date, and their verdict should stand.

Mellor, in reply.

The LORD CHIEF JUSTICE: This case presents certain difficulties, but on the whole the Court has come to the conclusion that it cannot interfere. The question which may have some day to be argued, when evidence as to acts of connection occurring more than six months before the charge may be given, really does not arise in this case. Although possibly the judge did not go quite far enough in his direction to the jury on the question of dates, the opening words of his summing up are, "What the prosecution have to satisfy you of is that on some day within six months of the commencement of this prosecution, which I think was the 14th October, the prisoner has had connection, or that he attempted to have connection, with this young girl. They have selected as the date which they choose the 6th May, and, so far as the prosecution in this case goes, everything turns on what you think happened on the 6th May." This puts the point quite correctly. It is a little difficult to put one's finger on any words in the summing up which amount to an actual misdirection, but the judge ought to have gone on to say that where it is not contradicted, the fact that the appellant had on previous occasions had connection with the prosecutrix was not evidence on the particular charge. We do not think the omission was of much importance in this case, but at the same time we do not want it thought that we regard the summing up as altogether satisfactory. It is obvious that where the relations are denied altogether, there may be cases where evidence as to the previous history of the parties is essential. We are well acquainted with Mr. Mellor's great experience in defending prisoners, and

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no doubt he was wise in not calling the appellant as a witness; but the fact remains that he was not called. The girl swore that she was with the appellant between 9 and 10 p.m. on the 6th May; the date was not unfairly identified by the fact that the girl's aunt wore a new dress on that day, and her brother says that he saw the appellant with his sister on that day, which he fixes by the fact that his aunt had a new dress and that he lost a pencil on that day. That circumstance is corroboration of the girl's statement that she was with the appellant on that evening. We agree with Mr. Mellor that the judge thought that the evidence called as to an *alibi* supported the defence, but I confess that, looking at the book, I am not myself so much impressed. If the book is right the appellant was at the drill hall at 8 p.m., and if he was at the drill it is possible that he was there till 9 p.m., but the evidence whether he stopped for the boxing depends on the witness Denning, whose answers under cross-examination do not impress the Court. In the circumstances the Court feels that the jury may not unfairly have thought that, in the absence of the oath of the appellant and of his subjecting himself to cross-examination, they must accept the evidence for the prosecution. Mr. Mellor says that he did not call him because he would have had to admit the previous acts of connection. Recognising this, it must be remembered that the fact was already out, and as he was not able to contradict the fact, his position would not have been much worse if he had gone into the box and enabled the strong observation to be made that he had denied the charge on oath and subjected himself to cross-examination. We agree that the case is one of those which are doubtful, but the Court cannot see its way to say that the jury who had heard the evidence of the girl and the other witnesses for the prosecution, but not of the appellant, were wrong in their conclusion. The sentence is not excessive, but it may run from the date of conviction.

Appeal dismissed.

A. L. B. T.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE PHILLIMORE, AND MR. JUSTICE BANKES.

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ARCHIBALD BROWNHILL.

When the Court is satisfied that a verdict was reasonable in view of the proved facts, it will not grant leave to appeal because the judge did not direct the jury on the alleged absence of motive on defendant's part or refer to his previous good character.

This was an appeal from an order of Bucknill J., refusing leave to appeal against conviction. The applicant was convicted of libel at the Warwick Assizes on 13th November, 1911, and was sentenced by Scrutton J. to two years' imprisonment, and was further ordered to pay the costs of the prosecution.

Parfitt, K.C. (with him *R. A. Willes*) for the applicant, who was not present. The libels were published in October, November, and December, 1910, and January, 1911. Two young men had been previously charged with having written and published the libels, but the prosecution failed, and the young men were acquitted. The libels consisted of a number of letters, many of which were signed "Spotter," and the applicant was called as a witness in the case. Subsequently the applicant was watched by certain police officers in plain clothes, and was seen to post something in a pillar-box, which, on being searched, was found to contain some letters signed "Spotter." This happened several times, but the pillar-box never contained a letter in the applicant's genuine handwriting. There was no direct evidence against the applicant, but suspicion was aroused against him because of his conduct. On the day he was summoned to appear before the magistrates to answer these libel

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charges, he disappeared from the town, and went to some relatives at Huddersfield. His excuse was that he had been told that it had cost the two young men who had been previously charged more than 800*l.* in order to defend themselves successfully, and he had not the means of providing anything like so large a sum for the purpose.

There were three grounds of appeal:—(1) That the verdict was unreasonable and against the weight of evidence; (2) That certain material facts beneficial to the defence were withheld by the judge from the jury. For the purpose of catching the applicant, certain marked stamps were sent to him in payment of some money owing to him, and it was hoped that some of those marked stamps would be used on the so-called "Spotter" letters. As a matter of fact, not one of these marked stamps was used on a "Spotter" letter. Only one of these marked stamps was traced, and that was found on an admittedly genuine letter of the applicant. The judge failed to point out these very material facts to the jury; (3) That the judge never alluded to the motive for committing the offence nor to the character of the person charged. Both these points were of the highest importance in this class of case, and although the applicant was a man of hitherto unblemished character, the judge never alluded to this fact.

Another important consideration which tends to shew that the applicant was wrongly convicted is, that since the applicant's conviction and while he has been in prison, several other "Spotter" letters have been received.

RIDLEY J.: This application ought not to be granted. The grounds relied upon are the omission by the learned judge to leave certain points to the jury. First comes the incident of the marked stamps. Thirty marked penny stamps were sent to the appellant in payment of some money due to him, and it was anticipated, perhaps I ought to say hoped, that some of these would be used on the envelopes containing the libellous letters. As a matter of fact, not one of these stamps was used on any letter referred to in the indictment. Only one marked stamp was traced, and that was used on a genuine letter. But it must be remembered that after the marked stamps were received only three libellous letters were sent enclosed in envelopes bearing penny stamps. Some of the libellous letters were not stamped at all, and most of them were stamped

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with halfpenny stamps. No reliable inference could be drawn as to the guilt or innocence of the applicant from considering this episode of the marked stamps, and we do not think that the learned judge was wrong or guilty of an omission in not referring to it, nor do we think that the verdict of the jury would have been different if he had referred to it. Next comes the question of motive. In many cases this is a matter of the highest importance, but in this case we do not think motive was of any importance. It is obvious that the writer of these libels, whether the applicant or anyone else, was a person of unbalanced mind, and who can say by what motives and in what direction an unbalanced mind will be affected? We do not think any useful purpose would have been accomplished by dealing with the subject of motive, and we are further of opinion that if the learned judge had laid any stress on the question of motive, it would have affected the applicant prejudicially rather than otherwise. Similarly with the question of character—the jury knew that the applicant was a man of good character, but in a case of this peculiar nature, it was not possible to direct the jury to draw any inference favourable or adverse from the applicant's good character. Though a man may have had a spotless character, if he is proved to have written letters like the libels in this case, one is compelled to have doubts as to his sanity.

There was ample evidence before the jury to connect the applicant with the posting of the letters. The learned judge cautioned the jury most carefully against falling into the mistake of acting on suspicion only. He directed them that they could not find the applicant guilty unless they considered the evidence sufficient—they must have proof of the applicant's guilt and must not act on suspicion.

The application is dismissed, but the sentence will run from November 13th, 1911, the date of the conviction.

Application dismissed.

Solicitor for the Appellant—*W. Harold Kimpton*, Birmingham.

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Murder.

On the trial of an indictment for murder, it is not a misdirection to call the jury's attention to the evidence that defendant threatened to kill the person in respect of whom he is charged, though it be proved that he was intoxicated at the time he made the threat.

Violent temper does not reduce homicide from murder to manslaughter, though words of provocation accompanied by such an act as spitting may do so.

This was an appeal against conviction on law and an application for leave to appeal against conviction on fact, but the latter application was subsequently withdrawn. The appellant was convicted on December 5th, 1912, at the Manchester Assizes, of the murder of his wife, and was sentenced to death by Lord Coleridge J.

J. W. C. Cremlyn, for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The learned judge misdirected the jury on a question of fact. He pointed out to the jury that Mary Burgoyne, a witness for the prosecution, had sworn that Mason had threatened on the 18th of October, a few days before the crime, to kill his wife, when he used the expression, "I am an innocent man: I have never done anything wrong in my life, and if ever I come across her again I will do her in"; whereas, Mary Burgoyne admitted in cross-examination that the precise words used by Mason were: "But I am innocent of the girl; if ever I get hold of her again I will do her in."

[PHILLIMORE J.: What is the difference?]

The words referred to the girl and not to the prisoner's wife.

[PHILLIMORE J.: Why should he want "to do a girl in" that he was innocent of?]

Because the girl had falsely accused him, and complained of his conduct to his wife.

[PHILLIMORE J.: There is no evidence of that before us.]

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Counsel submitted that the words did not bear the exclusive interpretation given to them by Lord Coleridge, who told the jury that "do in" could only mean kill. He contended that the words themselves might mean anything. But the real substantial ground of complaint was this, that although the learned judge told the jury that Mary Burgoyne said that the prisoner was "boozified" and that she did not regard the threat seriously as indicative of an intention on Mason's part to kill his wife, the judge forgot to point out that the witness said in chief that Mason was "boozified," in cross-examination that he was drunk, and in re-examination that, when he used the expression, he was so drunk that he did not know what he was doing. The judge first told the jury something wrong, and that which he told them would make wrong that which he left them to understand. He used the quoted words by Mary Burgoyne as the very basis of his argument that prisoner premeditated on the 18th October killing his wife, without telling them that they must receive that version with considerable caution because there was conclusive evidence that the prisoner could not have formulated an intention to kill on the 18th, as, according to the witness for the prosecution, he was so drunk that he did not realise what he was saying, and was, therefore, incapable, in law, of forming an intent.

[RIDLEY J.: You must look at the whole body of the evidence, and not merely pick out a phrase here and a phrase there.]

Counsel agreed with his Lordship's observation, but submitted that the general tenour of the evidence produced by the prosecution to establish premeditation was in his favour. If a witness said that prisoner was "boozified," "drunk," "incapable of knowing what he was saying," that evidence meant that the prisoner was so drunk, and his mind so obscured by drink, that he was in law incapable of forming any motive, good or evil. There was not a scintilla of evidence of premeditation except the words uttered in the presence of Mary Burgoyne, though it is true that premeditation is not an essential ingredient of the crime of murder. Killing on the spur of the moment, upon impulse, might be murder just as certainly as if the act had been long considered and deliberately carried out.

The learned judge, however, relied upon Mrs. Burgoyne's evi-

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dence to rebut the prisoner's story that he was grievously provoked and so completely under the influence of drink that the sudden anger, or the state of his mind, produced not merely by the drink taken during the day, but in the course of the three previous weeks, rendered him incapable of controlling his acts, if, indeed, he was at all conscious of them and their terrible consequence.

The passage complained of was: "I am bound to point out this to you, when such an expression as 'I'll do her in' is followed by acts, it is impossible not to consider whether there is or is not any connection between the words and the act. If there is any connection it must throw some light on the condition of the mind of the man who gave expression to it."

He respectfully contended that there could be no connection between Mason's language and his acts, because Mason did not know what he was saying, and the judge misdirected the jury when he invited them to draw such an inference. He told the jury what Mrs. Burgoyne thought of the prisoner's words, her estimate of their signification and value, but he refrained from putting clearly to them the evidence of the prisoner's condition when the words "I'll do her in" were uttered.

Parenthetically counsel observed that the jury were not reminded that Mason himself denied ever having used the phrase "I'll do her in," which was not inconsistent with Mrs. Burgoyne's estimate of his condition—"so drunk that he did not know what he was doing." The learned judge also told the jury that there was no evidence as to who was at fault, Mason or his wife, "except that of the prisoner, who is deeply interested in making out that he was the innocent person and she the provoking one." That statement was inaccurate. The witnesses called for the prosecution corroborated Mason's version. Mrs. Burgoyne and Mrs. Garner both agree that it was the wife's fault, that she was always nagging him, constantly drinking and selling up his home.

Counsel further submitted that the judge's statement of the law as contained in the following passage was at least ambiguous and calculated to mislead the jury. "He said: 'I was in a mad temper, that is why I did it'"; and "if that is the reason that does not reduce the crime to manslaughter, or else a man has only got sufficiently to lose control of his temper to reduce the crime which he commits from murder to manslaughter." The judge's observation might reasonably lead a common jury into thinking, because

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the deed was stigmatised by an ignorant man as one carried out "in a mad temper," that even if the provocation was such as would in law enable the jury to reduce the verdict to one of manslaughter, they were precluded from so finding because Mason had described his condition as "mad temper"—not drunk—not acting under provocation produced by spitting, but by "mad temper." He contended that if Mason's reason was obscured by drink, if the provocation was more than he could withstand having regard to his condition, it was his state of mind then, and not his estimate of it when sober, which the jury ought to have been directed to concentrate their attention upon. If a man has done an act under the influence of drink, he is not always competent when sober of explaining why, and how, he came to do the act. The law may be that a mad temper is no excuse for crime; it certainly is not good law to tell a jury that a man who is drunk must be convicted upon the estimate of his conduct, and the description of his condition, arrived at by himself when sober.

H. S. Q. Henriques and *Comyns Carr* for the Crown were not called upon.

RIDLEY J.: There is, in our view, no question of law on which this appeal should be allowed. The contention for the appellant is that certain words used by him, when he was in a drunken condition, were so misplaced from their context by the learned judge in his summing up, and certain observations were made by him as to the drunken condition of the appellant, that the result was a misdirection in law. Counsel argues that the language used by the appellant two or three days before the death of the woman, "If ever I come across her again I will do her in," do not mean that he will put an end to her life, but mean merely that he will strike her, or do something to spite her. We agree with the interpretation given by the learned judge, and do not agree with the meaning suggested by counsel. It is next argued that even if the words might mean "I will kill her," the learned judge ought to have told the jury that the appellant was so "boozified," so much under the influence of drink, that on that occasion they might not have been, and probably were not, used with the more serious meaning (*i.e.*, with the meaning of killing). We think, however, that the direction of the learned judge was perfectly correct, and

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that when words are followed by acts, it is open to the jury to say whether or not the words are used in the special meaning that would apply to the subsequent acts.

With regard to the plea of drunkenness as a defence to the charge of murder, the learned judge said, perhaps, more in favour of the prisoner than he was justified in saying. It is true that, if a man is under the influence of drink, provocation may have a greater effect on him than it would have had if he were sober. We think that Lord Coleridge J. interpreted the law too much in favour of the appellant, with the result that he gave the jury an opportunity, or even invited them, to find a verdict of manslaughter instead of murder, but the jury failed to make use of this opportunity, and on the evidence found a verdict of murder. It is not necessary for us on this occasion to say we disagree with the learned judge's statement of the law with regard to the possible mitigating effect of a plea of drunkenness on a charge of murder, but I may say, speaking for myself, that I should have some difficulty in agreeing with it. It is, however, not necessary to consider it further as if there was any mistake in the law, it was a mistake entirely in favour of the appellant, and not otherwise. Next, objection is taken to a statement by Lord Coleridge J.: "The prisoner said: 'I was in a mad temper, that is why I did it'—if that is the reason why he did it, that does not reduce the crime from murder to manslaughter." We consider this direction perfectly accurate. The learned judge went on to say: "If you believe he was spat upon, that might be such provocation as would reduce the crime from murder to manslaughter." We agree with that. Mere words of provocation or abuse could not, but words of provocation coupled with such an act as spitting upon the appellant might (though they need not necessarily) have the effect of reducing the crime from murder to manslaughter. The jury declined to find a verdict of manslaughter, and we see no reason for interfering with the verdict of murder.

The appeal must be dismissed, but this is without prejudice to any application the friends of the appellant may be advised to make to the Home Office.

Appeal dismissed.

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WILLIAM PITTS.

A jury should be warned against the danger of accepting the uncorroborated evidence of a child of tender years.

This was an appeal against conviction by leave of Bucknill J., and an application for leave to call further evidence. Appellant was found guilty on November 27th, 1912, at the Leeds Assizes, of feloniously, unlawfully, and carnally knowing a girl under the age of thirteen years, at Bradford, on August 8th, 1912, and was sentenced by Bailhache J. to fifteen months' imprisonment with hard labour.

W. Jardine, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was a porter at the Midland Railway Station, Bradford, and the prosecutrix is the daughter of a guard in the service of the Midland Railway. The appellant has been found guilty of the felony of carnally knowing, but there was no evidence given at the trial proving the commission of such an offence. If every word of the evidence of the prosecutrix is believed, the most that would be proved would be an indecent assault.

Comyns Carr, for the Crown. I agree that there is no evidence of any offence beyond an indecent assault, and I shall merely ask the Court to impose on the appellant a sentence for indecent assault.

W. Jardine: The next question is that of identity. Was the appellant the man who assaulted the prosecutrix? The appellant was a porter in uniform, similar in appearance to other porters in uniform. The offence took place in a dark cabin between 8 and 9 p.m. on a dark winter's evening. The prosecutrix was only a little girl of ten. Could her evidence of identification be relied upon? It is true that the prosecutrix was not in law an accomplice, and consequently if the jury chose to believe her evidence as against the oath of the appellant, no corroboration in law was absolutely necessary. This proposition would apply in the case of an adult prosecutrix, but in the case of a child prosecutrix, ten years old, it has always been considered desir-

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able, if not absolutely necessary, to have some corroboration, and the jury ought to have been warned of the danger of acting on the uncorroborated testimony of a child of such tender years. It is remarkable that there is not one reference to the subject of corroboration in the whole of the judge's summing up. The offence was committed on August 8th, no complaint was made by the prosecutrix until August 12th, and the prisoner was not arrested until August 23rd. The prosecutrix was infected with a disease as the result of the assault on August 8th, but when the appellant was medically examined on August 29th there were no ocular traces of the malady. It is true that after the appellant was arrested the locker belonging to him in the lamp room was opened, and in it was found a bottle of sandalwood oil, a mixture used in cases of that disease. The appellant swore that he had bought this mixture on April 22nd (and this was confirmed by the chemist from whom he bought it), not for the purpose suggested, but because of a swelling caused by riding a bicycle, and that he never took any of the mixture after April 24th. The appellant was very much prejudiced by some questions put by the counsel for the prosecution suggesting that the prisoner had written to another porter named Binks asking him to say that the sandalwood oil was bought for and belonged to him (Binks), and not to the appellant. Those questions ought not to have been put. The letter though called for was never put in, the appellant denied that he had ever written it, but the questions made such an impression on the jury that some considerable time after they had retired they asked to see this letter: perhaps it did not exist.

The appellant in his evidence swore that he was at work with a porter named Bosworth at the time when the assault was supposed to have taken place, and the learned judge was informed by the appellant's counsel that the reason why Bosworth was not called, though he had been communicated with, was that his reply was that after this lapse of time he could not remember whether or not the appellant was at work with him at the crucial time. It was quite probable that he was at work with him, but he could not remember. In spite of this explanation the learned judge commented with great emphasis and severity on the fact that Bosworth was not called to give evidence. Objection is taken to the summing up on the ground of the undue and unjustifiable severity of the comments upon Bosworth's absence from the witness-box, and also on the ground that no sufficient caution was given to the

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jury against acting on the uncorroborated evidence of a little girl ten years old.

Comyns Carr, for the Crown, referred to *Graham*, 4 Cr App. R. 218; 74 J. P. 246 (1910); and *Brown*, 6 Cr. App. R. 24 (1910) He was stopped by the Court.

RIDLEY J.: The conviction must stand as a conviction for indecent assault, but not for the felony of carnal knowledge. This is not the case of evidence given by an accomplice. The law is clear that a jury may not act on the uncorroborated evidence of an accomplice. In this case the prosecutrix was not an accomplice, but she was a child of very tender years, and although a jury may act on her uncorroborated evidence, it is always wise for the judge to address some caution to the jury as to the possibility of such a young child having a mistaken recollection of what happened. In this case we have come to the conclusion that there was ample corroboration, *e.g.*, the evidence of the chemist as to the purchase of the sandalwood oil, and the evidence of the ticket examiner who saw the appellant and the prosecutrix talking together. The summing up shews that the learned judge put very carefully to the jury all the points that told in favour of the appellant. The conviction will be altered to a conviction for indecent assault, and the sentence altered from fifteen months' hard labour to six months' hard labour, to run from the date of conviction.

Conviction varied. Sentence reduced.

S. M.

ARTHUR EDWARDS AND ALFRED GILBERT.

In s. 5 of 24 & 25 Vict. c. 96, the Larceny Act, 1861, *the words, "It shall be lawful to insert several counts in the same indictment against the same person," do not authorise charging one defendant in one count singly, and with another defendant jointly in another;* Harris, 5 *Cr. App. R.* 285 (1910), *distinguished.*

Effect of the proviso to s. 4 (1) *of the Criminal Appeal Act, when objection to an indictment has been duly taken below, considered.*

These were appeals against conviction on a point of law, and applications for leave to appeal against conviction on fact. The

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appellants were, together with two other persons, Edward Clayton Ashby and Robert Brooks, charged at the Middlesex Sessions before the Chairman and other justices, on an indictment alleging in the first count that the appellant Gilbert had stolen five sacks of wheat on 22nd October, 1912, the property of E. and J. Fountain, in the second count that the appellant Gilbert and Robert Brooks had stolen on 29th October, 1912, four sacks of wheat, the property of the said E. and J. Fountain, and in the third count that the appellant Edwards and Edward Clayton Ashby had received four sacks of wheat, the property of the said E. and J. Fountain, well knowing the same to have been feloniously stolen. At the trial, which took place on 26th and 30th November, 1912, objections were taken to the indictment on behalf of the appellants and Ashby on a motion to quash before plea, but these objections were over-ruled. After the evidence for the prosecution had been completed, by direction of the Court the prisoner Ashby was acquitted, and a verdict of "Not Guilty" was returned, at the suggestion of the Crown, against Brooks. Evidence was called on behalf of the appellant Gilbert, and eventually both appellants were found guilty and sentence was postponed until the next Sessions. The appellants were present in custody.

George Elliott, K.C. (with him *Eustace Fulton*), for the appellant Edwards. A firm of barge-owners at Brentford was in the habit of delivering by one of their barges consignments of wheat from the docks to Messrs. Fountain, at Uxbridge, and the appellant Gilbert was employed on the barge and was in charge of it. Many of the sacks containing the wheat had holes in them, with the result that a considerable amount of wheat escaped from the sacks and had to be swept up afterwards. According to the appellant Gilbert, he was entitled to the sweepings as his perquisites, and he sold it for 7*s*. 6*d*. a sack to the appellant Edwards, who was Ashby's manager. According to the prosecution, the sweepings were not the perquisites of the bargee, the appellant Gilbert, but were the property of the consignees, Messrs Fountain; moreover, the wheat had not escaped accidentally, but holes had been deliberately made in the sacks, and other dishonest means taken in order to procure an excessive quantity of leakings from the bags.

In accordance with s. 5 of 24 & 25 Vict. c. 96, the Larceny Act,

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1861, it is "lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts." In the present indictment the first count charges Gilbert alone with stealing five sacks of wheat on 22nd October, 1912, but the second count does not charge him alone with stealing on 29th October, 1912; it charges Gilbert and Brooks with stealing on that date. It is evident that Gilbert and Brooks are not "the same person" as Gilbert. The indictment is just as bad as if A. had been charged in the first count alone and B. had been charged in the second count alone. The Chairman was asked to call upon the prosecution to elect on which of these two charges they desired to proceed, or to quash one or other of the two larceny counts so wrongly joined in the same indictment, but he refused to put them to their election, or to quash either of the two larceny counts. If the prosecution had been compelled to select one count out of the two, or if one count had been quashed, the evidence relating to the other charge would have been excluded, and it is very doubtful whether the jury would have found a verdict of guilty on the larceny charge; to sell four or five sacks of sweepings on any one day would not in itself give rise to suspicion, but to have five sacks of sweepings for sale on one day, another four sacks for sale within a week afterwards, might naturally give rise to the opinion that these sweepings were not obtained honestly. If there were no conviction on the larceny counts, the third count for receiving necessarily falls to the ground. Further, every one is entitled to be tried according to law, and if the motion to quash was well founded, appellant was denied that right. Although, when a defendant on trial may be presumed to have waived his strict rights in law by not moving to quash the indictment before plea, the Court may exercise its powers under the proviso to s. 4 (1) of the Criminal Appeal Act, yet in no case has this Court held that that proviso applies when a defendant has moved to quash below at the proper time and in due form.

[BANKES J.: Is not the third count bad for uncertainty? The appellant Edwards, and Ashby, are charged with receiving "four sacks of wheat before then feloniously stolen, well knowing the

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same to have been feloniously stolen," but it does not say whether these four sacks are part of the five stolen on 22nd October, or whether they are the four sacks stolen on 29th October, or whether they are some of the sacks stolen on 22nd October, or some of the sacks stolen on 29th October. The words "before then feloniously stolen" would naturally refer to 22nd October, the date first mentioned. If it was intended to refer to the date 29th October, the words used should have been "lastly hereinbefore mentioned."]

Elliott, K.C.: That is an additional reason for quashing this indictment.

E. D. Purcell for the Crown. No objection was taken in the Court below on the ground of uncertainty. Every one concerned in the case assumed that the receiving charge referred to the four sacks mentioned in the second count of the indictment, and to nothing else. The only evidence given on the receiving charge was in respect of the four sacks stolen on 29th October. If any objection had been taken the indictment only required a verbal amendment by the insertion of the word "lastly," and such amendment would have been made. It is too late to complain after the verdict has been given. With regard to the objection that Gilbert and Brooks are charged with larceny in the second count, and Gilbert only charged in the first count, it has never been decided that such a combination is improper. There is no authority for saying that if two larcenies are committed against X. within six months, one by A., and the other by A. and B., the two charges cannot be included in the same indictment. Neither the appellant Edwards nor the appellant Gilbert can be prejudiced by the inclusion of Brooks's name in the second count. The only person who might conceivably have been prejudiced was Brooks, but he was not prejudiced in fact, as the Court directed the jury to return a verdict of not guilty in his case, there being insufficient evidence. Even if the indictment was bad, no substantial miscarriage of justice has taken place, and the Court had power to affirm the conviction under the proviso to s. 4 (1) of the Criminal Appeal Act.

The Court stated that from the learned Chairman's report the Court could not conclude that there would not be a miscarriage of justice on the merits of the case.

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Cassels, for the appellant Gilbert, was not called upon.

RIDLEY J.: In the opinion of the Court this indictment is bad. The Larceny Act, 24 & 25 Vict. c. 96, s. 5, allowed not more than three distinct acts of stealing to be charged in the same indictment, provided they were all committed within the space of six months, and provided also that they were committed by the same person and against the same person. If one larceny is committed by A., and another larceny by A. and B., these two larcenies are not committed by the same person. It is said in this case that the only person embarrassed by this improper joinder was the defendant Brooks, who was, in fact, discharged. That is not so; both the alleged receivers, the appellant Edwards, and Ashby, were embarrassed by the addition of the charges against Brooks. We have no doubt that the indictment is bad, but we are asked to act on the powers given to us by the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, and affirm the conviction on the ground that there has been no substantial miscarriage of justice. The Court has done this even where an indictment was bad (*John Harris*, 5 Cr. App. R. 285; 1910), but in that case the objection was not taken at the trial, whereas in this case the objection was taken in the Court below on behalf of both appellants. There is an appeal also in this case against conviction on fact, which we have not heard. We have also a communication from the learned Chairman of the Court below which prevents us from coming to the conclusion that it would be right to affirm the conviction notwithstanding that the point raised by the appellant is decided in his favour. The appeal must be allowed and the convictions quashed.

Convictions quashed.

Solicitors for Appellant Edwards—*Percy Robinson & Co.*

Solicitors for Appellant Gilbert—*Hanne & Son.*

S. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE PHILLIMORE.

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Murder.

When a witness on a trial has varied the date of an event from that in his deposition, it is correct to direct the jury that it is clear that the event happened on one of the given dates, and that though they are not at liberty to assume the truth of the statements in the deposition without further evidence, yet they are entitled on the whole of the evidence at the trial to decide between the two dates.

The Court will not, as a rule, permit an appeal on the ground that the trial judge wrongly allowed a witness to be treated as "hostile."

This was an application for leave to appeal against conviction, and to call further evidence. Appellant was convicted on the 14th December, 1912, at the Lewes Assizes, before Channell J., of murder, and was sentenced to death.

Patrick Hastings (with him *C. F. Baker*) for the appellant, who was present. On the 9th October, 1912, about 7.35 p.m., Police Inspector Walls was shot in Eastbourne by a man who was obviously a burglar, in circumstances which undoubtedly amounted to murder. The appellant, who was a burglar, was in Eastbourne at the time, having arrived there with Florence Seymour, with whom he was living, on the 2nd October. They stayed in rooms in Bolton Road until the morning of the 9th October. The prosecution relied on the fact that, on leaving, he said they were going to London, whereas in fact they went to other rooms in Tideswell Road, but the landlady admitted that the appellant had asked if she could keep them for two or three days longer, which she was unable to do. At 6.30 p.m. on the 9th October, the appellant and Florence Seymour went out from the rooms in

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Tideswell Road, and the prosecution called no evidence as to where appellant was between 6.30 p.m. and 8.30 p.m., except Florence Seymour, whose evidence I wish, for reasons which I shall shortly give, to leave out of account for the present. A coachman, Potter, who discovered the murderer, whoever he was, hiding above the portico of the Countess Sztaray's house, and who for a moment or two was able to see the man with the light of the carriage lamp shining on his face, was unable to identify the appellant as the man. The only other evidence of importance as to those two hours was that the police found a hat at the scene of the murder which would fit the appellant, and which had been bought in Bournemouth at a time when the appellant was there. It was proved that one person in ten took a hat of that size.

The defence set up was that of an *alibi*. The appellant said he and Florence Seymour went to a picture palace on that evening, and left it about 8.30 p.m. At about 8.40 p.m. a telegram was posted up in a shop stating that an inspector had been murdered by a burglar; the appellant's case from the outset was that he saw this telegram and that, being known to the police as a burglar, he was afraid that suspicion would fall on him, and it was in consequence of that that he wrote a letter to his brother which contained the sentence, "If you wish to save my life come at once and get me away." He also gave this as a reason for cleaning a revolver which he possessed in order to remove any finger prints, and for throwing it away. Had he been guilty of the murder, he would have thrown it into the sea, where it would never have been discovered. As a result of the appellant's letter his brother, and a man named Power, came to Eastbourne, and the latter, while posing as the appellant's and Florence Seymour's friend, was all the time setting a succession of traps to catch them, and was giving information to the police. On arrest the appellant made a statement that he had been to a picture palace, where there was a series of pictures shewn called "Dante," and where a man sang a song about a rose. It was obvious that he was putting forward this as his *alibi*.

There was also evidence that the appellant threw away a rope. The evidence of appellant was that he threw it away on the 8th October, whereas Florence Seymour had said it was on the evening of the 9th October. His explanation was that some friends

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gave him the rope, which they intended to use for a burglary planned for the 8th October, and that as they did not call for it, he threw it away. I have no explanation to offer if it was in fact thrown away on the 9th October.

Florence Seymour gave evidence at the police court which, I admit, would be almost insurmountable if believed; she told a story of what happened on the night of the 9th October, which was absolutely inconsistent with the story of the prisoner, and narrated various actions of the appellant which were suspicious, especially when coupled with the appellant's denial. But she insisted that, whatever the date was to which she was referring, it was the night on which they spoke to a man about a baby crying. At the trial this man was called, and also the father of the child, who said they remembered talking to her and a man about the crying baby, and were clear that it was on the night before the murder; Florence Seymour was at that time easily recognisable as she was pregnant. When the appellant was before the magistrates he was undefended on the first two days, but he put certain questions to Florence Seymour in cross-examination which were clearly directed to the point whether he was not at the picture palace at the time of the murder, and whether the events of which she was speaking took place on the 8th or 9th October. A note was sent him by his brother advising him not to ask any more questions, and at the subsequent hearings he was represented by a solicitor, who, thinking, no doubt, that the suggestion of an *alibi* had been plainly made, asked no further questions on the subject.

My appeal is based on two grounds; the first is that the judge misdirected the jury on the question of Florence Seymour's evidence. At the trial she gave different evidence to that given by her before the magistrates, and was eventually, by leave of the judge, treated by the prosecution as a hostile witness. The jury were not, I submit, entitled to consider at all her evidence at the police court, where it was contradicted by her at the trial, as evidence of any facts against the appellant, and the proper direction would have been that the jury in weighing her evidence at the trial exonerating the appellant might take into consideration the fact that before the magistrates she had given different evidence which incriminated him. This is covered by a long line

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of authorities, and there is no difference between the civil and the criminal law as to the evidence of a hostile witness.

[THE LORD CHIEF JUSTICE: If Florence Seymour had said that all her previous evidence was untrue your point would be good, but at the trial she spoke to practically every important incident sworn to by her in her deposition, and said they were true, but that they happened on the 8th October and not on the 9th. Can that make her evidence as to the facts inadmissible?]

[PHILLIMORE J.: She deposed to facts at the trial which were injurious to the appellant if they happened on the 9th October, immaterial if they happened on the 8th. The judge may say to the jury, "It is clear they happened on one of these dates; you must not take her evidence at the police court, but from the other evidence given at the trial you are at liberty to come to the conclusion that they happened on the 9th.]

If such a direction had been given I could not object, but the judge told the jury in terms that they could choose between her evidence at the trial and her evidence at the police court; he said, "Upon this question, which I am now drawing your attention to, as to what took place on the night in question—the night of the murder—between 6.30 and 8.30, she has told you a story of walking up the sea front, stopping at a seat and her staying there with a parcel that had been given her by her husband as she calls him. I will call him the husband, but, of course, we all know that he was not. . . . She has told a story about sitting on the seat, her husband went away from her, coming back without his hat, they then went down to the sea front a little way, then she threw away a rope, and then they went back to Tideswell Road; and she said they started from 4, Tideswell Road, on that journey. If so, it was on the night of the important day—the 9th. She has told that story and told it in considerable detail." The vital part of that story she had only told in the police court. "Now she says that was not on the 9th, but was on the 8th. The question is which of those stories is true for this part of the case"; and later, "You have the two stories which she told, and the question is which of the two is true." A little further on the judge said, "She is somehow or other induced to tell the story

which she did tell, and it is a story which tells against the prisoner. Do you think that what happened was that she was trapped into telling the truth which she did not want to tell, or that she was trapped into telling something which was entirely untrue and strongly against the man she was fond of? It is difficult to see what could have been said to her, whether by Power, or by Inspector Bower, or all the five police officers together, which could induce her to tell a false story against the man she was fond of. . . . If you consider that, is it possible to entertain much doubt as to whether the story which she then told was the true one, or the story which she tells to-day is the true one? That is for you." The jury must have thought from that that they were at liberty to believe which story they liked; no warning was given them that they must not accept the evidence of Florence Seymour at the police court as evidence of facts; it was the only evidence there was as to the movements of the appellant during those two hours.

The treatment of a hostile witness is now governed by the Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 3, but the greater part of this section was only declaratory of the existing law. There are many authorities as to what should be the proper direction on the evidence of a hostile witness and as to what will invalidate the verdict of the jury. In *Wright* v. *Beckett*, 1 M. & Rob. 414 (1834), Lord Denman C. J., dealing with the dangers of admitting previous statements by a witness contradicting his evidence at the trial, said, "The most obvious and striking danger is that of collusion. . . . The other danger is that the statement, which is only admissible to contradict the witness, may be taken as substantive proof in the cause. But this danger equally arises from the contradiction of an adverse witness: it is met by the judge pointing out the distinction to the jury, and warning them not to be misled. It is not so abstruse but that judges may explain it, and juries perceive its reasonableness." In *Ewer* v. *Ambrose*, 3 B. & C. 746; 5 D. & R. 629 (1825), it was held that a direction similar to that given by Channell J. in the present case was improper; Bailey J., said, "I think there ought to be a new trial, because the answer of itself was not evidence of any fact, and it was left to the jury to consider whether they would credit the testimony given by the witness at the trial, or that given in his answer in Chancery." See also

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Greenough v. *Eccles*, 5 C. B. (N. S.) 786; 28 L. J. C. P. 160; 5 Jur. (N. S.) 766 (1859); and *Dibble*, 1 Cr. App. R. 155; 72 J. P. 498 (1908) The effect of the whole summing up was to invite the jury to believe whichever story told by Florence Seymour that they thought proper. This was a serious misdirection.

My second point is that the judge misdirected the jury in telling them that the *alibi* put forward by the appellant had never been raised by him until the trial, in spite of the fact that both by his statement to the police, and by his cross-examination of Florence Seymour, he had clearly indicated his *alibi*. The judge, after referring to the altered position a prisoner stands in now that he can give evidence, and commenting on the advantage to a guilty prisoner of putting forward a defence for the first time at his trial, when it was too late for the police to investigate it, and the disadvantage to an innocent person adopting such a course, said, "In cases of this sort it always strikes me you have got to put yourself in the position of an innocent person accused of a serious offence. Do you think you would withhold the real defence you have got? In the present case the girl Florence Seymour told a detailed story of going up the cliff, going back to the lodgings, and going out a second time to see the pictures. That they did go on the second time between nine and ten o'clock to see the pictures I should think there can be no possible doubt about, because they seem to have told the landlady that they were going, and she has given evidence to that effect; but Florence Seymour had told a detailed story that they had two journeys out, on one going up the cliff, and on the other, after going back to the lodgings again, going to this picture exhibition. If you were an innocent man, and knew you had been twice that night to the pictures, could you have refrained from asking her the question, 'But did not we go twice to the pictures that night?'"

[PHILLIMORE J.: That is the point. It was never suggested until the trial that they went twice.]

The summing up was based on the danger of affording the prosecution no opportunity of investigating the *alibi*, but the *alibi* had been suggested from the first. On these two grounds I submit that this conviction should be quashed.

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Sir F. Low, K.C. (with him *Cecil Whiteley*), for the Crown was not called upon.

The LORD CHIEF JUSTICE: This is an appeal against a conviction for the murder of Inspector Walls, a police officer, at Eastbourne, on the 9th October. The Court has listened to the very able and lengthy argument by counsel, who conducted the defence at the trial, and was very properly commended by Channell J. for his conduct of the case. The notice of appeal raises the question whether it was proper to treat the witness Florence Seymour as a hostile witness at the trial. This point has not been argued before us, and we, therefore, express no opinion whether this question can be raised on appeal. Having regard to the decision in *Rice* v. *Howard*, 16 Q. B. D. 681; 55 L. J. Q. B. 311; 34 W. R. 532 (1886), we desire to say that there must be exceptional circumstances to justify an appeal to this Court on the ground that a witness had been allowed to be treated as hostile.

Now, before I deal with the facts I will deal with the two points taken by Mr. Hastings. For a moment I thought that he was contending that the whole of Florence Seymour's evidence was inadmissible; it turns out that he did not mean to contend this. He does contend that having regard to the circumstances in which she gave her evidence there was a misdirection, or an insufficient direction, as to her evidence. It is said that practically it was a direction to the jury that if they believed the evidence she gave at the police court, and not that which she gave at the trial, it was open to them to approach the question from that point of view. We do not understand that there was any such direction. The fact is that both to the police and before the magistrates Florence Seymour spoke to certain occurrences which were said to have taken place on the 9th October, and many of which, if they did take place were vital for the consideration of the jury as to the guilt or innocence of the appellant. At the police court she put all these occurrences on the 9th October, the day of the murder. When she was called at the trial it appeared fairly early in her evidence that she was going to say something different on the question of the date. It appeared that she did not deny many material occurrences, but said they took place on the 8th October and not on the 9th. No authority

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is necessary to shew that in those circumstances she could be cross-examined by counsel for the Crown, and this was allowed on the ground that she had previously given the 9th October as the correct date. As far as her evidence at the trial is concerned she adhered to the statement that in stating the date to be the 9th she had said what was untrue to her knowledge, but spoke to many vital incidents as happening on the 8th. It is not necessary to go at any length through her cross-examination; it will be found that as to the most important incidents Sir Frederick Low put the question whether the fact was true, and she said it was, but gave a different date. As to the other points it was not put so distinctly, but the same appears to be the case. In these circumstances Mr. Hastings contends that as the incidents on the 8th October had no bearing on the case her evidence was inadmissible. I will say at once that the jury have to deal with the evidence given at the trial, but if that evidence contradicts the whole of the evidence given at the police court, then the evidence given at the police court was not of itself evidence against the appellant. No authority is wanted as to that. But the Court knows of no rule or authority that, because a witness denies his or her evidence as to one point, that makes the rest of the evidence inadmissible.

In these circumstances we must consider one or two important points. According to the evidence given by Florence Seymour before the jury, the appellant had, on the 8th October, done a number of things. On October 10th he had cleaned a revolver with the object, apparently, of removing any finger-prints; then he had hidden the revolver in the beach in her presence; and he had previously hidden or thrown away a rope. It is suggested that the rope may have in fact been thrown away on the 8th, but we are unable to see any reason why he should have thrown away the rope on that day; still one cannot fathom the mind of a person engaged in a life of crime. There was evidence by independent witnesses that on the 9th October a person who was seen crouching above the vestibule of a certain house shot the inspector. There were the letters and telegram sent by the appellant to Power and his brother, and there was the fact also that he changed his clothes, though that is not of much importance. There is the very important fact that they were only at Tideswell Road for one day, and left on the 10th October. If the evidence of Florence

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Seymour is carefully examined it will be found that, to reconcile the story she told at the trial with the argument addressed to the Court, her evidence must either be rejected, or divided into two parts. At the beginning and end of her evidence she refers to conversations with the landlady at Tideswell Road, which could only have happened on the 9th October. The middle of her evidence, if true, referred to events which happened on the 8th October.

The appellant, though he says he did certain things on the 8th, admits that, because he was a burglar and was known as such to the police, what happened on the evening of the 9th induced him to do many things which he did do, such as sending the letter and cleaning the revolver, and gives this as the reason for doing certain of the acts spoken to by Florence Seymour. It does not commend itself to our judgment, that a man would act as he did if he was not connected with the murder. It is unreasonable to say that the police would charge him with having committed a brutal murder without other evidence than this. We are unable to see any reason why he should do what he did do if it were true that he did it on the 8th, and we therefore concur in the view that the question whether the events told by Florence Seymour happened on the 9th October or not was an important matter for the consideration of the jury. It is said that Channell J. did not sufficiently direct the jury, and in fact misdirected them that the question was between the evidence she gave at the trial and the evidence she gave at the police court. Two passages in the summing up have been called to our attention (his Lordship read the two passages quoted in the argument above on this point). With regard to everything except the date she said the same before the jury as she did before the magistrates. To say that the judge, in the words that have been criticised, told the jury to decide simply whether the girl was telling the truth at the police court as to the date of the occurrences to which she spoke, is to put into the words used by the judge a meaning which the jury could not have put upon them, and is an unjust reading of the passage. The Court is quite unable in face of the careful examination of the facts in other parts of the summing up, and the direction in the beginning of it, and again later, that if the jury believed that the appellant was at the picture palace between 6.30 and 8.30 p.m. on the 9th October, he was entitled to be

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acquitted, to say there was any misdirection. Practically what we are asked to listen to in an appeal from a conviction for murder is a speech to us as a jury that we ought to find a different verdict. There was ample reason for the verdict in this case. Mr. Hastings does not contend that there was not ample evidence to go to the jury if there was no misdirection. He has suggested an ingenious explanation for the cleaning the pistol; I asked him if he had any suggestion to make why the rope was thrown away, and he frankly said he had not if it was done on the 9th. Having regard, therefore, to the conduct of the appellant deposed to by Florence Seymour at the trial, the letters sent by him, and his statements to the police, it is quite impossible for us to come to the conclusion that there was not strong, and even conclusive, proof to justify the verdict.

Mr. Hastings has taken one other point. It is suggested that there was a misdirection in the comments made by the judge on the question of the *alibi*. He dealt with the importance of telling the true story at once, and suggested that the appellant had not acted as an innocent man would have done under the circumstances. When the summing up is examined the Court is satisfied that Channell J. was pointing out, and rightly pointing out, that the story that the appellant had been twice to the picture palace on the 9th October was never suggested by him until it became necessary having regard to the evidence of Florence Seymour and that of the landlady. Whether it was necessary or not for the judge to point out the importance of an innocent man telling his story at once, it was certainly very relevant. Having regard to the view held by the Court it is not necessary to say more. We have carefully considered the points Mr. Hastings has raised. If Florence Seymour had at the trial wholly withdrawn the evidence given by her at the police court, different considerations would have arisen. There was no misdirection, and it is necessary to say that there was abundant evidence to justify the verdict. The appeal therefore must be dismissed.

Appeal dismissed.

Solicitors for the Appellant—*W. H. Speed,* and *Davenport Jones and Glenister,* Hastings.

A. L. B. T.

EDWARD HOPWOOD.

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Killing another person, in an attempt to commit suicide, may be murder.

This was an application for leave to appeal against conviction, and to call further evidence. Appellant was convicted on the 11th December, 1912, at the Central Criminal Court, before Avory J., of wilful murder, and was sentenced to death.

The facts, according to the evidence for the Crown, were that the appellant, a married man with three children, separated from his wife, had had immoral relations with the deceased, a music-hall actress named Florence Silles. On the 13th September she discovered that instead of being a man of means as he had represented, he had been presenting worthless cheques, and said in his hearing, "I know that I have been very foolish, and I shall go back to work," and they parted. On the 23rd September the appellant asked two railway porters at Liverpool Street Station to watch her and to ascertain if she was going about with other men, and to report to him. On the 26th September he bought a pistol and twenty-five cartridges. On the 28th September, at 7 p.m., by means of a forged telegram, the appellant met the deceased at the Holborn Restaurant, afterwards going to the Holborn Viaduct Hotel, which they left in a taxi-cab at 11.45 p.m.; on the way the cabman heard three pistol shots and a woman's scream from inside the cab; he opened the door and the woman fell out. Two more reports were heard afterwards, and the appellant was found to have attempted to commit suicide. The defence put forward by the appellant, who refused to be represented by counsel at the trial, was that he was shooting at himself, that the deceased tried to stop him, and that there was a struggle, in the course of which she was accidentally shot. The judge directed the jury that even if they accepted this defence it would constitute murder if the shot which killed her was intentionally fired for the purpose of killing himself, but the jury found the appellant guilty of shooting the woman intentionally.

Appellant in person. The judge directed the jury that the shot which caused death was the one behind her shoulder, and did not leave it to them to find that such was the fact; he also told them that she was in such a position that it was practically impossible

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for the wound to have been caused accidentally; this again should have been left to the jury. The medical evidence was that of a young and inexperienced practitioner, and his evidence contained many inconsistencies. Having regard to the fact that there were two wounds in my own head, one must have been caused before the deceased was injured at all, but the prosecution tried to make out that I only shot myself after she left the cab. There was contradictory evidence as to the number of pistol shots heard. The judge misdirected the jury in telling them that the wound was through the deceased's back, whereas the evidence was that it was in the point of the shoulder; this must have prejudiced the minds of the jury; also he told them that she gave up all her contracts in the first week in June at my request, although I gave evidence that they were only given up on the 8th July, and then only at her express desire; she wanted to leave the stage, so I wrote the letter to the agent to help her. The judge further misdirected the jury in recommending them not to trouble about the holes in the cab when these holes shewed that I must have been shooting at myself in the first instance, and not at the deceased.

When she was taken to the hospital she had a glove on her right hand, which would have shewn signs of there having been a struggle, and would have been marked with powder, but this glove disappeared and was never forthcoming. The holes in the cab are the only positive evidence which could direct the attention of anyone as to how the accident happened, but the prosecution went entirely on the question of motive. The judge began and ended his summing up by reminding the jury that I was a married man, which prejudiced the jury against me. He pressed on the jury that my interviews with the porters at Liverpool Street Station shewed that I had a motive, whereas the next day I went to Brighton to do what I could for her. It was only after hearing that my company must be wound up that I framed the intention of injuring myself; the telegram to Croucher shews that.

R. D. Muir and *E. Percival Clarke* for the Crown, were not called upon.

The LORD CHIEF JUSTICE: There is not the slightest ground for this appeal. The appellant asks leave to call eighteen wit-

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nesses; I have looked through the papers to see what is the evidence he expects them to give, and none of them says anything which has the slightest bearing on the appeal to this Court. It is one of the clearest of cases. The appellant, who is a married man with three children, had, according to the evidence, induced the deceased to give up some engagements as an actress, and to live with him. He had certain dealings with worthless cheques, which led to her leaving him and expressing the opinion that she had been very foolish. It is obvious that the appellant wished to keep the girl from having anything to do with other men; he consulted two railway officials at Liverpool Street Station, and obtained some information from one of them to the effect that she was going with some other man. The appellant told him to ring him up if he saw them together as he wished to catch them red-handed. Three days later, on the 26th September, he bought a pistol and some cartridges, and on the 28th September he sent the woman a telegram, in the name of Kelly, asking her to meet him at the Holborn Restaurant. He went there taking the revolver, and they were there together from 7 to 10 p.m., when they went to the Holborn Viaduct Hotel. They left that hotel at 11.45 p.m. in a taxi-cab, and the girl died from revolver wounds inflicted in the cab. Possibly one wound was inflicted while she was struggling, but undoubtedly one was caused by a shot from the back through the heart; it would appear from the evidence that she had endeavoured to leave the cab. Afterwards the appellant tried to shoot himself, and inflicted wounds on himself which were not very serious. The woman died in the hospital. The evidence of the doctor commends itself to this Court, and was to the effect that the wound which caused death could not have been inflicted in a struggle, but must have been the result of a deliberate act. He had planned the murder and carried it out with great brutality; whether suicide was being attempted or not it would still be murder; but the jury found him guilty, and said that they were of opinion that the act was premeditated. We have listened to all he has to say; he is a man of education, but his moral sense seems to be utterly warped, and he does not seem to appreciate his position. The appeal must be dismissed.

Appeal dismissed.

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ARTHUR BENJAMIN.

A witness cross-examined as to the contents of a document may put it in (not as evidence of the truth thereof, but) to prove that his testimony at the trial was not an afterthought.

Counsel ought not to inform the Court of any facts he has personally investigated in the course of preparing the appeal.

Coll (24 *L. R. Ir.* 522; 1889) *followed.*

This was an application for leave to appeal against conviction and sentence, and to call further evidence. Appellant was convicted on the 5th December, 1912, at the County of London Sessions, of assisting in conducting a gaming house, and was sentenced to six months' imprisonment with hard labour.

G. St. J. McDonald, for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The case arose out of a raid on a gambling house in the East End of London, at which fifteen persons were arrested. The police took the view that the appellant was the owner of the house, and that two other men, who were fined £25 each, were assisting him. Detective-Sergeant Jones gave evidence that he kept observation on the house from the 4th to the 11th November, 1912, standing on the chimney of a neighbouring house. This chimney is only twenty-one inches square, with a round funnel in the middle, so that there would be only six inches to stand on, and I desire to call an expert to prove that the chimney is in a rotten condition. I examined the chimney myself, and asked the Deputy-Chairman to let the jury examine it themselves in the luncheon interval, but he refused. When Jones was giving evidence he began to read from his note-book; I objected, but my objection was over-ruled. I suggest that the note-book was concocted for the purposes of this case; it contained notes on no other case, and when Jones read from it at the police court his evidence was quite different. The reason for the change was, I suggest, that Jones knew that in the meantime I had been to see the chimney stack.

When Mr. Fulton, who appeared for the Crown at the trial, was addressing the jury, he referred to Jones's note-book, which had never been put in evidence; I consequently objected, but the Deputy-Chairman recalled Jones, and he proved the book which

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was then put in. I asked to see it, but I did not apply to cross-examine Jones on the point.

[PHILLIMORE J.: One of the other prisoners had cross-examined Jones as to the note-book, and took the very point that it had been manufactured for the purpose.]

The note-book ought never to have been admitted in evidence; it was hearsay evidence of the worst kind. See *Norton*, [1910] 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 54 S. J. 602; 26 T. L. R. 550; 5 Cr. App. R. 65; *Maughan* v. *Hubbard*, 6 L. J. K. B. 229 (1828); and *Gibson*, 18 Q. B. D. 537 (1887).

[PHILLIMORE J.: But see *R.* v. *Coll*, 24 L. R. Ir. 522; C. C. R. (1889); cited in Taylor on Evidence, 10th ed., s. 1474.]

A man cannot make evidence for himself: see Phipson on Evidence, 5th ed., p. 215, citing *Hardy*, 24 How. St. Tr. 199, at p. 1093 (1794), and other cases.

If leave to appeal is not given the sentence should run from the date of conviction. A previous conviction was referred to after verdict, which was said to have been at Old Street, but was, in fact, in Dublin, which does not count.

[THE LORD CHIEF JUSTICE: Yes, it does. French and South African convictions have been taken into account.]

In any case the appellant was then only bound over for frequenting, so the present is practically his first conviction.

THE LORD CHIEF JUSTICE: I wish to make this preliminary observation. Mr. McDonald has told us that he went himself to see the chimney stack and found it was unsafe, and secondly, that he went himself to Old Street police court and found out certain facts regarding the prisoner's previous conviction. Counsel ought not to ask us to act upon evidence of this sort. Where it is desired to bring new facts before this Court proper evidence of them should be obtained and tendered, and the Court should

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be asked by means of a proper application to receive it. However, no harm has been done here.

This is an application for leave to appeal against conviction on the ground that a statement written in a note-book was wrongly admitted in evidence. It was, of course, a statement not made in the presence of the appellant, and in the first instance it was clearly inadmissible in evidence. The note-book was first referred to at an early stage of the trial. At that stage the detective might have referred to the book to refresh his memory, and, if so, Mr. McDonald might have seen the book, and he might have cross-examined the witness about it: he might then have made the charge which he afterwards made, namely, that the book was forged. That, however, is not what happened. Mr. McDonald suggested in his speech that the story of the chimney was untrue, and was an afterthought, on the ground that the witness had said nothing about the chimney in his depositions before the magistrate. The note-book shewed that Jones mentioned the chimney to his inspector before the proceedings in the police court, and the note-book was produced to verify that fact. Then Mr. McDonald said that the note-book was a forgery. The book was not put in as evidence, but in order to shew that, unless the book was a forgery, the story of the chimney was not an afterthought. *Coll* is a case where a previous statement of a certain witness, not made in the presence of the prisoner, was put in evidence in order to rebut the charge that his story as told at the trial was an afterthought. That is exactly this case. In Taylor on Evidence, 10th ed., s. 1474, there occurs this passage: "If upon cross-examination of a witness, counsel, by referring to what such witness has deposed when on a previous occasion giving an account or no account of a transaction, suggests as a reason for disbelieving the witness's present evidence that on the previous occasion he omitted the name of the prisoner at present on his trial, the witness thus impeached may, without the deposition taken on the previous occasion being put in, state that when giving evidence on the previous occasion just referred to, he did give the same account of the transaction as he has just given, and did mention the name of the prisoner at present upon his trial." The principle is exactly the same in this case. It is impossible, therefore, to quash the conviction on the ground that the note-book was wrongly admitted in evidence, and this appeal

must be dismissed. It is clear that the appellant cannot have his sentence dated back to his conviction, but as a Court could have sat to hear this appeal upon the 30th December, his sentence may run from that date.

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Appeal dismissed.

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LAWRENCE BRISCO GRAHAM.

20 *January.*

A document may be a "valuable security" within s. 90 of 24 & 25 Vict. c. 96, the Larceny Act, 1861, although invalid as the instrument it purported to be.

This was an application for leave to appeal against conviction on fact and an appeal against conviction on law, which had been placed in the Summary List. Appellant was convicted, with one Crawley, on the 11th December, 1912, at the Lewes Assizes, before Channell J., of fraudulently inducing the execution of an instrument, and was sentenced to ten months' imprisonment with hard labour.

Appellant, who was not present, was not represented by counsel.

PHILLIMORE J.: In this case a man named Mannering was minded to persuade a girl to go through a secret form of marriage with him, and he persuaded the appellant and one Crawley to assist at such a mock marriage. The appellant and Crawley were trying to make money out of the transaction, and the case for the Crown was that they produced a piece of paper and put the blank side of it, on which was written the date and the place, before the girl, representing that it was a certificate of the marriage. They obtained the signature of Mannering and the girl in her married name to this document. On the face of the document was written: "I, the undersigned, in view of the expenses incurred by Messrs. Graham and Crawley, promise to pay on demand twenty pounds, £20, in settlement thereof on my marriage to Mr. G. Mannering. Signed (see over)."

Their object would have been defeated if the signature had been on the face, since their intention was to deceive the girl.

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Whether their intention was to use the document to obtain the £20 or for the purposes of blackmail, there was ample evidence of fraud, and that the signature of the girl was obtained by fraud. The only point is this. It is suggested that a promissory note must be signed on its face; this was not done in this case, though there was a reference to the signature on the face. There was a stamp on the document which was not good enough to make it a valid promissory note for £20, but which was enough to carry £5. It is suggested that Channell J. directed the jury that it was a promissory note; it is clear that he did not decide if it was or not, but he held that if it was intended that the document should "be afterwards made or converted into or used or dealt with as a valuable security," the appellant and Crawley would have committed an offence within the Larceny Act, 1861, s. 90 (24 & 25 Vict. c. 96). It is not open to persons to obtain an acquittal on the ground that there was a defect in the document which might have made that document invalid if they had attempted to make use of it. But we do not say that the document was not a good and sufficient promissory note for the amount for which the stamp was good. The Court decides the question, however, on the ground that it was an apparently good note, intended to be used as security for money, and dismisses the appeal.

Appeal dismissed.

A. L. B. T.

JOHN SMITH.

Habitual criminal—The fact that appellant has been doing work during the greater part of a short interval of liberty is not necessarily conclusive against his being a "habitual criminal."

This was an appeal against sentence and an application for leave to appeal against conviction as a habitual criminal and to call further evidence. Appellant was convicted on the 3rd December, 1912, at the Central Criminal Court, before the Recorder, of being a habitual criminal, having previously pleaded guilty to felonious wounding, and was sentenced to three years' penal servitude and five years' preventive detention.

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JOHN SMITH.

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Appellant in person. I was released from my last term of imprisonment on the 21st August, 1912, and between that date and the commission of the offence for which I was charged, on the 23rd October, 1912, I was for six weeks in the employment of Mr. Green, whom I wish to call to give evidence.

Comyns Carr, for the Crown. The question of work was suggested by counsel for the appellant at the trial; the name of the suggested witness was called at the trial, but he did not answer. The appellant did not give evidence. A detective gave evidence that he had twice in this period seen him in the company of convicted thieves, once during the time that he says he was in this employment.

RIDLEY J.: The appellant seeks to appeal against his conviction as a habitual criminal. It appears that, on the 23rd October, a rather daring robbery was attempted in one of the underground stations, and the appellant stabbed the official who tried to apprehend him. He had been released from prison on the 21st August, and the question for us is, whether there was proper evidence to go to the jury that between those two dates the appellant was leading persistently a dishonest or criminal life. The interval was short, and there is evidence before the Court in the shape of a letter from Green stating that the appellant did work for him during the time, but at the trial there was evidence that a detective saw him on two occasions in the company of convicted thieves, and so did another witness. The jury might fairly have concluded that he was loitering for the purpose of committing an offence; we cannot say that the jury was wrong, and the appeal therefore fails.

Appeal dismissed.

A. L. B. T.

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CHARLES CONNOR.

Where several prisoners make an affray in concert, it is open to the jury to find them individually guilty of different offences.
Severity of sentence.

This was an appeal against conviction on the certificate of Scrutton J., who tried the case, and an application for leave to appeal against conviction on fact, and against sentence. Appellant was convicted on the 6th December, 1912, at the Birmingham Assizes, of shooting with intent to murder, and with inflicting grievous bodily harm with intent to cause grievous bodily harm, and was sentenced on the 7th December to five years' penal servitude.

Gandy for the appellant, who was present. The appellant was convicted with three other men, named Morris, Broome, and Franklin, on an indictment containing five counts; the first two charged them with shooting at Samuel Sheldon with a pistol with intent to murder, the third and fourth charged them with shooting with intent to maim and with intent to do grievous bodily harm respectively, and the fifth count charged them with feloniously wounding him with intent to do him grievous bodily harm. The charge arose out of a feud or vendetta which has been carried on for some time in a certain part of Birmingham between two factions known as the Beech side and the Sheldon side, and the evidence for the Crown was shortly to the effect that Sheldon was in the King's Arms public-house, Great Barr Street, Birmingham, at 9.30 p.m. on the 12th October, when the appellant entered, followed by the three other prisoners; that the appellant said "Hello, Baggy, we have got you now," and hit him on the side of the face with a life-preserver; Franklin then shot him with a revolver, inflicting a slight wound. The blow inflicted by the appellant was a very slight one, and the wound was referred to throughout the case as a "black eye"; the doctor called it a contusion, and it was only my own cross-examination which elicited the fact that the skin was broken, which made it a wound in the technical sense. The appellant's defence was an *alibi*, while the other three prisoners admitted being present. The jury returned what, I submit, was a special verdict: the foreman said,

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"We find that the one man went there with the intention to commit murder, and the other two went to aid and abet, and that the fourth man struck the blow with intent to do grievous bodily harm."

The Clerk of Arraigns: "Do you find them guilty of shooting with intent to murder?"

The Foreman: "We return a verdict of shooting with intent to murder."

The Judge: "That is, you find a verdict against Morris and Broome and Franklin of shooting with intent to murder. Do you find that Connor was there or not?"

The Foreman: "We find that he was there and that he did strike Sheldon. We find that he struck the blow with intent to do grievous bodily harm."

The Judge: "Then you find that Franklin attempted to murder Sheldon, and that Morris and Broome were concerned in the shooting, and that Connor also was present."

The trial was adjourned until the next day, when, after argument as to the effect of the verdict, the judge entered a verdict against all the prisoners on the first and second counts, and against the appellant on the fifth count also; he gave the appellant leave to appeal on the question as to what verdict should be entered on the jury's finding.

My submission is, first, that the verdict on the fifth count is bad. The prisoners were only tried for the shooting; they were asked to plead to the first count of the indictment and were told that there were other counts varying this charge, that is, the charge of shooting; Mr. Willes, who appeared for the Crown at the trial, opened it as a case in which all the four prisoners were concerned in the shooting.

[THE LORD CHIEF JUSTICE: That does not prevent him relying on any offence proved by the evidence and justified by the indictment.]

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It is true that I did not object to evidence of the blow; I could not do so since it was part of the *res gestæ;* but the blow was an independent felony which could not properly be included in the same indictment as the shooting, and it was only the latter for which he was tried.

In the second place, I submit that the verdict on the first two counts was not justified by the finding of the jury; their finding as regards the shooting was confined to the other three men, and there was no finding that the appellant was acting in concert with them; they only found that he was present; they did not find any intent to murder on his part.

[THE LORD CHIEF JUSTICE: We shall not allow the verdict on the first two counts to stand.]

Although there is not a word of the summing up to which I could take exception, several matters were not mentioned which were very material to the case; the chief point was that the prosecutor made no complaint against the appellant until the fifth day after the occurrence; it was only after his brother had visited him in the hospital that it was suggested that the appellant was concerned in the matter. Burkett and Robinson, two other witnesses, never suggested the appellant's complicity in the first instance. A summing up should be fairly and reasonably full, and if these matters had been dealt with the jury would probably have found a different verdict.

The sentence was too severe if the verdict of the jury is held to be only a verdict on the fifth count; he was a man with eight years' good character. In my submission penal servitude should not be inflicted for a blow which only caused a black eye.

Willes for the Crown. The sentence was not too severe when the state of district is taken into consideration. This is shewn by the fact that one witness stated that he was afraid to give information to the police. This state of things had existed for four years.

In view of the fact that the only defence set up was that of an *alibi*, which the jury negatived, the judge was right in entering a verdict against the appellant on the first two counts.

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THE LORD CHIEF JUSTICE: This case is not free from difficulty. We are not sure that this class of question has ever been raised before, or formally decided. If the case had been launched as one involving two separate offences, independent of each other, different considerations would arise. But it was opened, and the evidence supported that view, that it was one affray, committed within the space of a minute, in which four people took part. In the course of this affray some one shot, and others helped in the shooting of, the prosecutor, and some one struck him. We are not aware of any authority that where, without objection, the circumstances arising out of one affray are proved before the jury, they may not find a verdict that the prisoners are guilty of different acts of violence arising out of that affray. The jury in this case found that one man shot the prosecutor with intent to murder him, and that another struck him with the intent to cause grievous bodily harm. There is no objection to their saying so by their verdict on such an indictment. No question was raised of embarrassment, or that the whole matter could not be tried properly. It was a proper finding such as it was open to the jury to find on the incidents proved, and the point is not a proper one to be raised on behalf of this appellant, who says he was not present at all.

Mr. Willes has suggested that the verdict on the first two counts should stand. The Court is of opinion that this verdict cannot be supported since there was no finding of an attempt to murder. If there is nothing irregular in the proceedings it is for the jury to find the intent and the facts in each case. We cannot say that the jury found an intent to murder here. The appellant may have paved the way for something more serious, but it was open to the jury to distinguish the intent as well as the facts in each case. We cannot consider the argument that there was not sufficient evidence against the appellant; it is impossible to say that the jury were not justified in saying that the appellant was there. It seems to us that, both according to the modern practice and as it ought to be under the Criminal Appeal Act, the verdict was properly entered on the fifth count, but not properly entered on the first or second. An attempt has been made to say that it was not wounding, but Mr. Gandy admits that he himself elicited the fact that it was a wound.

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CHARLES CONNOR.

Lord Alverstone C.J.

The conviction on the first and second counts will be quashed, and the appeal dismissed as to the fifth count.

The fifth count will technically carry the sentence passed on the appellant, but it seems to us doubtful if Scrutton J. would have inflicted five years' penal servitude if the conviction had only been on that count. We think the sentence should be reduced to one of three years' penal servitude. One word on the very proper observation made that it is not a case for penal servitude at all. No one denies the serious state of affairs in this part of Birmingham; two gangs have been shooting at each other for years. This very affray was commenced by the appellant, so to take him out of the gang is not warranted by the evidence. In the circumstances the sentence cannot be less than three years' penal servitude.

Verdict varied—Sentence reduced.

Solicitors for the Appellant—*Sharpe and Darby,* West Bromwich.
Solicitors for the Crown—*J. Ernest Hill,* Birmingham.

A. L. B. T.

LILY EVERITT.

Severity of sentence.
Statements against a prisoner after conviction must not be taken into account in the sentence, unless strictly proved.

This was an appeal against sentence by leave of Rowlatt J. Appellant was convicted at the West Kent Sessions on the 2nd January, 1913, of larceny, and was sentenced to twelve months' imprisonment with hard labour.

Appellant in person.

Comyns Carr for the Crown. It does appear that the Chairman took a matter into consideration of which the appellant denied her guilt. But even if that was excluded from consideration the offence was a serious one.

RIDLEY J.: This appellant pleaded guilty to larceny. The offence was of a serious nature: she took a furnished house and

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LILY EVERITT.

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lived there for some time, in the meantime stealing everything from the house she could lay her hands on; the stolen property being of the value of £38. At the trial a further statement was made by a detective to the effect that she obtained a situation as housemaid with a lady at West Hampstead, and after being there for a week ran away with £3. She denied this at the time, but the Chairman in passing sentence said that but for this statement he would have only sentenced her to six months' imprisonment. This statement being denied ought not to have been taken into consideration, and the Court therefore reduces the sentence to one of six months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

A. L. B. T.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE AVORY, AND MR. JUSTICE LUSH.

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FRANK NEVELL.

Severity of sentence.

This was an appeal against sentence by leave of the full Court. Appellant was convicted on the 4th December, 1912, at the Central Criminal Court, of uttering a forged cheque, and was sentenced by Mr. Commissioner Rentoul to three years' penal servitude.

Appellant in person. I had a hard struggle after my release from prison six years ago; this is my first conviction for felony.

D. Rowland Thomas for the Crown. The police gave the appellant a good character and said he had been a respectable man since his marriage. The judge seems to have sentenced him to penal servitude because he refused to divulge the name of his accomplice.

RIDLEY J.: In this case the Court last week gave leave to appeal against sentence. After hearing appellant and counsel for the Crown we think that, though the offence was a serious one, the sentence is unnecessarily severe. To forge a cheque for £160 stolen from a cash box, and to tell lies about it in an endeavour to get it cashed, is a serious offence. There is, however, this to be said in the appellant's favour, that he has not been convicted since 1907, and that he received a good character from the police. On the whole the Court is of opinion that the sentence should be one of eighteen months' imprisonment with hard labour to run from the date of conviction.

Sentence reduced

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JOSEPH RICHARDSON AND GEORGE RICHARDSON.

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A properly constituted Court of Quarter Sessions is competent to discharge a jury whether the individual justices were present at the trial or not.

This was an appeal against conviction in each case by leave of Rowlatt J. Appellants were convicted on the 2nd January, 1913, at the Yorkshire (North Riding) Sessions, of burglary; Joseph Richardson was sentenced to fifteen months' imprisonment with hard labour, and George Richardson to three years' penal servitude.

W. Nixon for the appellants (under s. 10 of the Criminal Appeal Act), who were present. My first point is that the trial was altogether invalid. The appellants were tried in the morning before the Deputy-Chairman in the second Court; the jury retired to consider their verdict and returned to receive further direction. After giving this direction the Deputy-Chairman stated that the Court would adjourn, but during the adjournment the Chairman, who had finished the remaining cases in the first Court, having been told apparently that the jury had not been able to agree, called them into his Court and discharged them. This was before the time to which the Deputy-Chairman had adjourned the trial, so I was not present then, nor do I know whether the appellants were present when the jury was discharged. They were then tried afresh before the Chairman. In a trial for felony the prisoners should be present throughout, and so they should have been present when the jury was discharged.

Further, the Chairman of the first Court had no power to discharge the jury; this power is in the presiding judge alone, who was in this case the Chairman of the second Court.

[Avory J.: If the whole body of magistrates constitutes the Court of Quarter Sessions and any two of them form a quorum, why was this not a discharge of the jury by the Court of Quarter Sessions?

Ridley J.: It was an act done quite irrespective of the trial. There was no interference with the conduct of the trial; it was

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only an administrative act which the other Chairman would have done if he had been present.]

It is not an administrative act, but a matter for judicial discretion, and the person in whom the discretion lay was not allowed to exercise it. It was held in *Lewis*, 78 L. J. K. B. 722; 100 L. T. 976; 73 J. P. 346; 25 T. L. R. 582; 2 Cr. App. R. 180 (1909), that this Court has no power to interfere with this discretion, therefore it follows *a fortiori* that no one else can interfere. The Chairman of the first Court was not acquainted with the facts, so was not in a position to exercise the discretion. See also *Charlesworth*, 31 L. J. M. C. 25; 1 B. & S. 460; 8 Jur. N. S. 1091; 5 L. T. 150; 9 W. R. 842; 9 Cox C. C. 44; 2 F. & F. 326 (1861); and *Winsor*, L. R. 1 Q. B. 287, 390; 35 L. J. M. C. 121, 151; 7 B. & S. 490; 12 Jur. N. S. 561; 14 L. T. 567; 14 W. R. 695; 10 Cox C. C. 327 (1866).

[AVORY J.: The presiding judge referred to in these cases is the judge of assize; they are not dealing with a Court of Quarter Sessions.]

The expression is also used in *Davison*, 2 F. & F. 250; 8 Cox C. C. 360 (1860), which deals with a case at Quarter Sessions.

[AVORY J.: See *Baines*, 6 Mod. Rep. 192, in 1704.]

That was before power was given to sit in two Courts by 21 & 22 Vic. c. 73, the Stipendiary Magistrates Act, 1858, ss. 9—11. Where there are two Courts of Quarter Sessions they have co-ordinate jurisdiction. As the Chairman of the first Court had no power to discharge the jury, the second trial was altogether a nullity.

Secondly, I was not allowed properly to cross-examine a witness for the Crown named Moore at the second trial; I wished to put to him answers which he gave at the first trial which were inconsistent with those given by him at the second, in particular as to the sounds which enabled him to say that a wash-leather bag which he said he saw, and which was alleged to have been stolen, contained money; the Chairman ruled that I could not press him as to what took place at the other trial, but must take his answers. Although he asked later the very question I wished

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to put to the witness, I submit I ought to have been allowed to prove the statements made by the witness at the first trial if denied by him at the second. Owing to the Chairman's ruling, I was unable to put many questions to the witness which I should otherwise have done. Lastly, the Chairman misdirected the jury. He directed them on the doctrine of the presumption arising from the possession of recently stolen property, but there was no clear evidence that the appellants were ever in the possession of any of the stolen property; there was no identification of the cash, and the question of the wash-leather bag depended entirely on the evidence of Moore. The prisoners in evidence said there was no such bag in the basket, but only some brown paper; the Chairman, however, stated as a fact that part of the proceeds of the burglary were found in the possession of the prisoners.

Rowan-Hamilton for the Crown was not called upon.

AVORY J.: There are two points in this case, which has been very well argued by Mr. Nixon, which must be dealt with separately. The first point raised is that there was no power in the Chairman of the first Court, as it is called, to discharge the jury who had sat in the second Court, and who, after being locked up for a long time, were unable to agree upon their verdict. The foundation of Mr. Nixon's argument is, that in all the cases dealing with the discretion as to the discharge of a jury who are unable to agree, the expression is found that "the presiding judge" is to exercise the discretion. Mr. Nixon says that the Chairman of the second Court was the presiding judge within the meaning of these cases, and that he alone could exercise the discretion in this case. In fact the Chairman of the second Court was not present when the jury was discharged, and, it is argued, the discharge was a nullity and the second trial was in consequence a nullity. The answer is that in all those cases the Court had not before them the point which arises in this case. All reports must be taken with the facts of the particular case, and it could not be said that these decisions were intended to cover all possible cases which might arise. There is no decision which covers this particular question, but the answer is that the Court of Quarter Sessions did in the exercise of its discretion discharge this jury. In the absence of a statement to the

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contrary we must assume that the Court was properly constituted of two justices or more, and, therefore, the discharge of the jury was a valid discharge. A further point has been taken that the discharge was not valid because there is no evidence that the appellants were present. We cannot assume that they were not present, and, therefore, it is not necessary to decide this point. The discharge of the jury operates as if there had been no trial at all, and there was nothing in the opinion of the Court to invalidate the second trial.

The second point urged is, that the summing up was not satisfactory, and that there was not evidence to justify the verdict. As to the evidence, this was undoubtedly what is called a weak case, and Mr. Nixon may reasonably have hoped to be successful. But it is impossible for this Court to say that there was no evidence to be left to the jury, although it is true that unless they believed the evidence of Moore that there was a bag in the basket which, when moved, appeared from the sound to contain money, there was no case against the appellants; if the jury chose to believe Moore there was evidence to justify their verdict. As to the summing up, like most summings up when reproduced by shorthand, it is open to criticism. But when the substance is looked at as a whole it correctly left the case to the jury, whether the appellants were in possession of the stolen property, and, if so, whether they had given a reasonable explanation of such possession, and it was pointed out that the burden of proof was on the prosecution. The Court cannot interfere with the verdict, but the sentences may run from the date of conviction.

Appeal dismissed.

A. L. B. T.

HARRY FIRTH.

An implicating statement, the contents of which are not evidence against a defendant, may be put in as evidence of his demeanour on hearing it.

This was an appeal against conviction on grounds involving a point of law. Appellant was convicted on the 2nd January, 1913, at the Leeds City Sessions, of house-breaking, and was sentenced to three years' penal servitude.

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Charles Mellor for the appellant, who was not present. The appellant was charged with a man named Joseph Aitcheson; the two men were apprehended in a public-house, where on the previous day Aitcheson had, in the presence of the appellant, handed some of the stolen property to the publican as security for the loan of a sovereign. At the police station Aitcheson was taken into a private room where he made a statement to the effect that the appellant had said to him: "You are a stranger here and nobody knows you; will you try and fence these for me?" The appellant was then brought in, and the statement was read over to him in the presence of Aitcheson; when it had been read, Aitcheson said: "I will stand the lot myself, Firth; I will deny every word I said in that statement concerning you when I get before the magistrate. There is no need for both of us to go to prison." The appellant said nothing until he was charged, but after being charged he said: "I will say what I have to say later on." My submission is that there was no justification for admitting Aitcheson's statement as evidence against the appellant. The question in these cases is how far the answer or demeanour of the prisoner makes the statement evidence against him. *Hickey*, 6 Cr. App. R. 200; 27 T. L. R. 441 (1911). The appellant may well have thought that when Aitcheson said he was going to deny all, that he was denying that he ever made the statement, and that, therefore, it was unnecessary for him (the appellant) to deny it. *Thompson*, 1 K. B. 640; 79 L. J. K. B. 321; 26 T. L. R. 252; 4 Cr. App. R. 45 (1910), is against me, but in that case there was a challenge to the appellant to own up like a man. A similar statement was held to be inadmissible in *Norton*, (1910) 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 26 T. L. R. 650; 5 Cr. App. R. 128, and there the statement was less tainted than it is in this case, where it was the statement of an accomplice. At the trial Aitcheson gave evidence denying that he had made the statement at all. *Gavin*, 15 Cox C. C. 656 (1885), is authority that a policeman should not interrogate or cross-examine a prisoner; this was what was done in effect here.

[LUSH J.: *Gavin* is expressly overruled by *Best*, (1909) 1 K. B. 692; 78 L. J. K. B. 692; 100 L. T. 622; 25 T. L. R. 280; 2 Cr. App. R. 30.]

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See also *Benjamin Pearson*, 1 Cr. App. R. 77; 72 J. P. 449, 451 (1908). The Recorder ought to have warned the jury, if the evidence was admissible, as to the danger of accepting it since it was the statement of an accomplice, and was, according to the prisoner's evidence, never made at all. The real danger of admitting such a statement might arise thus: A. and B. are charged with stealing and receiving; a constable says to B., "A. has made a statement that you were with him." If B. was silent he might easily be convicted. Then, if between conviction and appeal it could be proved that no such statement had been made, what would become of the conviction? Could it be said that the invented statement or trap—followed by silence—could be construed into an admission against B.?

[AVORY J.: No one approves of the police setting traps for prisoners, but, as a matter of law, if the police made an untrue statement to a prisoner which called forth an admission, would it not be evidence?]

I am afraid so; the custom is gradually creeping in. A judge at the trial has no power to ask questions of a prisoner, and a policeman should not have greater power in this respect than a judge. There were two questions here: did Aitcheson make the statement at all? and did the appellant's demeanour make it evidence? The Recorder should have told the jury that Aitcheson probably made the statement, if at all, to save his own skin. The summing up suggested in effect that if once you admit Aitcheson's statement you must admit that it was true. See *Murtrie*, 6 Cr. App. R. 128 (1911).

Gingell for the Crown was not called upon.

RIDLEY J.: Mr. Mellor has put this case very ably. It has been suggested that the appellant's conduct when the statement was read to him was the only evidence against him, but there was the fact that the men were together when the stolen property was offered to the publican, and there was other evidence before the jury. Still we do not suggest that it was a very strong case against the appellant; it was, however, a matter for the jury, who found a verdict against the appellant, and it is not competent

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for this Court to say that the verdict was wrong if the evidence was admissible. Mr. Mellor's point is that Aitcheson's statement was unfairly dealt with as far as the appellant is concerned. What took place? Aitcheson said to Detective-Inspector Bradley: "I went to the Brunswick Hotel along with Harry Firth, and he said to me: 'You are a stranger here and nobody knows you; will you try and fence these for me?'" thus bringing the appellant into the story as the man who got Aitcheson to offer the goods. Then Aitcheson added: "I took them to the landlord and he lent me a sovereign on them; I gave the sovereign to Harry Firth." That statement was not evidence against the appellant as he was absent when it was made. The detective then brought in the appellant and read him Aitcheson's statement, and Aitcheson then said—at least we assume so though Aitcheson denied it: "I will stand the lot myself, Firth, I will deny every word I said in that statement concerning you when I get before the magistrate. There is no need for both of us to go to prison." Then the appellant after being charged said: "I will say what I have to say later on." It seems to me that what Aitcheson is alleged to have said became evidence against the appellant in this way and to this extent, that when it was repeated his conduct became evidence either against him or for him. If he said nothing, although the statement implicated him directly, it would be evidence against him. It is subject to this observation on the part of Mr. Mellor that everyone does not deny the truth of such statements at once. I agree, and the present instance is not a very strong case because between the statement and the appellant's answer another statement was made by Aitcheson. It was not so immediately the duty of the appellant to deny the statement when Aitcheson said he was going to deny it. I admit that, but at the same time it seems to me that when Aitcheson made the second statement ending with the words "There is no need for both of us to go to prison," that statement did not altogether free the appellant from the necessity of denying the first statement. It indicates that both were concerned in the crime, but not necessarily that both confessed to it. The appellant's conduct, then, is evidence neither against himself nor in his favour. If he had at once denied the truth of the statement it seems to me that it would have been evidence in his favour. I am not one of those who think that

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in that case it would have ceased to be evidence. These statements became evidence when read over, not of the facts contained in them, but of the conduct of the person to whom they are read.

I remember that I once tried a case at Nottingham for the murder of a man in Messrs. Cook's office; he was shot with a revolver and died a few hours afterwards. The detective got a statement from him that he had been shot by the prisoner who was endeavouring to rob the safe. The man died; so this could not be made evidence. The detective apprehended the assailant and read the statement to him; the man said nothing. There was little other evidence, but that statement was used at the trial. I was careful, however, to tell the jury that it was not evidence of the fact, and as there was no other evidence of the fact the jury declined to act on the statement and returned a verdict of manslaughter. That was before the passing of the Criminal Appeal Act, but it is a fair illustration of how this question is treated in an Assize Court.

I cannot think that the rule has been broken here. The detective said on oath that these statements were made, and we cannot find any misdirection in the summing up. The Recorder was right in saying that there was evidence, and in drawing the attention of the jury to the conduct of the appellant and as to how far it constituted evidence for or against him. In the result the jury returned a verdict against him and this Court cannot interfere.

Appeal dismissed.

Solicitor for the Appellant—*P. Burnett,* Leeds.

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BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE PHILLIMORE, AND MR. JUSTICE AVORY.

TIMOTHY PATRICK O'CONNOR.

When there is an information it is the commencement of criminal "proceedings." Smith (*L. & C.* 131; 1862) *followed.*

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This was an appeal against sentence on a point of law by leave of Darling J., and an application for leave to appeal against a conviction for procuration under the Criminal Law Amendment Acts, 1885 and 1912. The appellant was sentenced by Darling J. at the Central Criminal Court on the 18th January, 1913, to eighteen months' imprisonment with hard labour and thirty strokes of the cat.

The appellant was arrested upon the 7th December, 1912, and charged on the 9th December. The Criminal Law Amendment Act, 1912, 2 & 3 Geo. 5, c. 20, which gives the Court power to inflict a sentence of flogging in certain cases, does not extend to cases in which "proceedings" were "pending at the commencement of this Act" (s. 8), *i.e.*, before the 13th December 1912, the day on which the Act came into force.

Beaufoi Moore for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Proceedings were "pending" in the present case before the 13th December, for the arrest took place on the 7th and the charge before the magistrate on the 9th December, therefore the sentence of whipping could not stand. He referred to *Yates* v. *R.*, 14 Q. B. D. 648; 54 L. J. Q. B. 258; 52 L. T. 305; 33 W. R. 482; 49 J. P. 436; C. A.; (1885).

Travers Humphreys for the Commissioner of Police. Sect. 3 of the 1912 Act in effect gives additional powers only to Courts

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of Assize, therefore the word "proceedings" in s. 8 could only apply to proceedings after indictment; the powers of the summary jurisdiction are not affected. If it had been meant to exclude every prosecution pending it would have said so. Sect. 7 (2) does increase the powers of the summary jurisdiction, and if any steps had been taken in such a court before the 13th December, those increased powers could not be exercised. "Proceeding" does not mean "prosecution."

[AVORY J.: The Act of 1885 incorporates the Vexatious Indictments Act, and therefore you must commence proceedings by an information.]

But there are two sets of proceedings, one before and the other after indictment, and it is only that Court which deals with a prisoner after indictment whose powers are extended by s. 7 (5). Sect. 7 (6) relating to evidence was aimed at getting rid of the decision in *Director of Public Prosecutions* v. *Blady* (1912), 2 K. B. 89; 81 L. J. K. B. 613; 106 L. T. 302; 76 J. P. 141; 22 Cox C. C. 715; 28 T. L. R. 193; Div. Ct.

[PHILLIMORE J.: The Act provides new rules as to evidence, and if your contention is correct, evidence which was not admissible before the magistrates could be admitted at the trial owing to the Act coming into force in the interval.]

That may be the effect of the statute. If the Court is of opinion that part of the sentence which orders a flogging is bad, will they take into consideration the observations of Darling J. in passing sentence, viz., that if he had not had power to order a flogging he would have increased the term of imprisonment to two years?

RIDLEY J.: The Court is of opinion that there was ample corroboration to justify the verdict of the jury. They, however, think that proceedings had begun before the day the new Act came into force. They interpret the word "proceeding" in its ordinary meaning, and can see no difference between it and "prosecution." Proceedings were commenced by the information, as they were in *R.* v. *Smith*, L. & C. 131; 31 L. J. M. C. 105; 9 Cox C. C. 110; 8 Jur. N. S. 199; 5 L. T. 761; 10 W. R.

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273 (1862), where the words were "any proceeding pending" (*a*). *Willace*, 1 East P. C. 186 (1797), is there cited—"The Judges . . . . unanimously held that the information and proceeding before the magistrate was the commencement of the prosecution." The sentence, therefore, must be modified so far as it relates to the flogging. The appellant's conduct has been very bad, and the term of imprisonment with hard labour will be increased to two years, to date from conviction.

Sentence varied; term of imprisonment increased.

Solicitors for the Commissioner of Police—*Wontner and Sons.*

J. R. M.

FREDERICK AUSTIN.

On the true construction of s. 7 (5) of 2 & 3 Geo. 5, c. 20, the Criminal Law Amendment Act, 1912, a prisoner is within its provisions although there was no conviction on indictment previous to that for a second or subsequent offence.

A penal statute is retrospective in respect of procedure.

This was an appeal against sentence by leave of Darling J. Appellant was convicted at the Central Criminal Court on the 18th January, 1913, of living on the immoral earnings of women, and was sentenced by Darling J. to twelve months' imprisonment with hard labour and twenty-four strokes of the cat.

It was proved at the trial that the appellant had been summarily convicted three times for similar offences under 61 & 62 Vict. c. 39, the Vagrancy Act, 1898, before the date (the 13th December, 1912) when the Criminal Law Amendment Act, 1912, came into force. This latter Act provides by s. 7 (5) that a person charged under the 1898 Act "may, instead of being proceeded against . . . . as a rogue and vagabond . . . ., be proceeded against on indictment; and on conviction on indictment shall be liable to imprisonment, with or without hard labour, for a term not exceeding two years; and in the case of a second or subsequent conviction . . . . on indictment, the Court may, in addition to any term of imprisonment awarded, sentence the offender, if a male, to be privately whipped."

(*a*) See the judgment in *Brown*, p. 173, below.

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L. O'Malley for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The 1912 statute is a penal one, and should not be read as being retrospective in effect, as it is not expressly stated to be so, nor can it reasonably be found to be so by direct implication. Therefore, the sub-section which makes the offence indictable for the first time must be taken as referring to indictable offences under the Act, and both the first and second convictions must be for offences since the Act. In *Vine*, L. R. 10 Q. B. 195; 44 L. J. M. C. 60; 31 L. T. 842; 23 W. R. 649; 13 Cox C. C. 43 (1875), it was held that s. 14 of 33 & 34 Vic. c. 29, the Wine and Beerhouse Act Amendment Act, 1870, which says that "every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence shall be granted to any person who shall have been so convicted," applied to a person convicted of felony either before or after the Act. Cockburn C. J. said, in giving judgment: "The question is, whether a person who had been convicted of felony before the Act passed became disqualified on the passing of the Act. I think he did. If one could see some reason for thinking that the intention of this enactment was merely to aggravate the punishment for felony by imposing this disqualification in addition, I should feel the force of Mr. Poland's argument, founded on the rule which has obtained in putting a construction upon statutes—that when they are penal in their nature they are not to be construed retrospectively, if the language is capable of having a prospective effect given to it and is not necessarily retrospective. But here the object of the enactment is not to punish offenders, but to protect the public against public-houses in which spirits are retailed being kept by persons of doubtful character." Counsel also referred to the judgments of Mellor, Lush, and Archibald JJ., and submitted that the present case was brought under a distinctly "penal" statute and not under one primarily intended "to protect the public," and that it must not, therefore, be construed retrospectively.

[PHILLIMORE J.: The ordinary rule that a penal statute is not construed retrospectively does not apply to procedure. And though it does apply to the creation of a new offence, the 1912 Act merely creates an additional punishment for an existing offence; it is not creating a new punishable offence.]

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Counsel further submitted that by the sub-section no sentence of whipping could be passed except after two convictions on indictment.

Travers Humphreys for the Crown was not called upon.

PHILLIMORE J.: This appeal must be dismissed. Under the Vagrancy Acts, 1824 and 1898, a man might have been convicted before a Court of summary jurisdiction for a second offence, as an incorrigible rogue and sent for sentence to Quarter Sessions. The sentence might have been a flogging. The 1912 Act took this power away from Quarter Sessions in cases under the Vagrancy Act, 1898, by providing that the second conviction must be upon indictment, *i.e.* after trial by jury. The Act, however, does not say that this second conviction must be the second upon indictment. The Act was not intended to lessen the deterrents for this class of offence, and if the contention of the counsel for the appellant was correct, the appellant could neither be whipped under the new Act nor by Quarter Sessions. The Act provided that an offender convicted since the Act came into force might be punished in a certain way on account of his past conduct.

Appeal dismissed.

J. R. M.

CHARLES PAYNE.

A strong caution should be addressed to the jury as to the reception of the evidence of the wife of an accomplice.

Neal *v.* Taylor (7 *C. & P.* 168; 1835) *commented on.*

Whether the evidence of an accomplice's spouse is ever good corroboration, quære.

This was an application for leave to appeal against a conviction and sentence of two years' imprisonment with hard labour at the Middlesex Sessions on January 6th, 1913, for stealing and receiving.

The applicant was not present, and no counsel appeared on either side.

The facts were that a motor garage was broken into on the night of the 12th December, 1912, and a quantity of accessories stolen. Another man was arrested for the offence, and upon state-

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ments made by him the police visited the applicant's house and there found part of the stolen property. This other man pleaded guilty, and he and his wife gave evidence at the trial for the Crown to the effect that the applicant had planned the offence with them.

PHILLIMORE J.: In this case the applicant has put forward various idle grounds of appeal. The only point, however, that gives the Court any trouble is the conduct of the trial. The jury were warned that the evidence of the man who pleaded guilty required corroboration, but they were neither warned that his wife's story also required corroboration, nor that her evidence was not corroboration of her husband's. The case of *Neal and Taylor*, 7 C. & P. 168 (1835), is quoted in the text-books as deciding that the evidence of the wife of a so-called accomplice is not corroboration of the husband's evidence. But it did not decide so broad a proposition. All that Park J. said was that it could not be accepted "in a case like this. The wife and the accomplice must be taken as one for this purpose." And, moreover, the proceedings as reported cannot be correct, because the judge purported to withdraw the case from the jury, instead of letting it go to the jury with a caution. If the decision in *Neal* applies to this appeal, the proper course would have been to allow the wife's evidence to be given and then to have warned the jury to be very careful in giving a value to it. The question whether in no case and in no circumstances could the testimony of the wife of an accomplice be corroboration of his statements remains to be argued on some future occasion. In the present case the Court is of opinion that the proviso to s. 4 (1) of the Criminal Appeal Act applies, and no substantial miscarriage of justice has occurred.

Application dismissed.

J. R. M.

WILLIAM BROWN.

"Proceedings" are "pending" within the Criminal Law Amendment Act, 1912, when a warrant has been issued before the day that Act came into force.

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This was an appeal against sentence. The appellant was committed to the County of London Sessions, as an incorrigible rogue living on the earnings of prostitution, by virtue of s. 1 of the Vagrancy Act, 1898; he had been convicted summarily for similar offences in 1909 and 1911. The sentence passed on the 9th January, 1913, was nine months' imprisonment with hard labour and twenty-five strokes with a birch rod.

The material facts were that although the warrant was dated the 7th December, 1912, the appellant was not arrested until the 13th December, 1912, which was the date upon which the Criminal Law Amendment Act, 1912, came into force.

Valentine Ball for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Quarter Sessions had no power to inflict the sentence of whipping. The power under the Vagrancy Act of 1824 was only reserved to them by s. 8 of the 1912 Act for cases in which "proceedings" were "pending" before the 13th December, 1912. No proceeding was pending in this case until some active step had been taken, *e.g.*, the arrest or proceedings before a Court.

[Phillimore J.: Are not proceedings started by the information? *Casbolt*, 11 Cox C. C. 385; 21 L. T. 263 (1869).]

It was further submitted that the sentence was too severe in view of the appellant's health.

Comyns Carr for the Crown was not called upon.

Avory J.: The Court is of opinion that in this case proceedings were pending before the 13th December, 1912. In *Smith* (above, p. 168), Erle C. J. says: "First there was a 'proceeding pending' in respect of a thing done prior to the commencement of that Act, under one of the Acts repealed. The

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thing done was the feloniously abstaining from surrendering himself. Then the matters mentioned in the case stated for our consideration are all steps taken in one proceeding, which is completed and brought to a consummation by indictment and conviction. They are all proceedings pending, and the indictment was a part of those proceedings." Wilde B. says: "If the prosecution had been commenced there was 'a proceeding pending' within the meaning of the Act." Proceedings being pending Quarter Sessions had power to inflict the sentence, and the Court does not find any reason for interfering with it. The plea of bad health is commonly put forward in these cases, but it is a matter for the prison doctor.

Appeal dismissed.

J. R. M.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE PHILLIMORE, AND MR. JUSTICE PICKFORD.

THOMAS RICHARD ALDEN.

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Severity of sentence.

This was an appeal against sentence by leave of Rowlatt J. Appellant was convicted at the Norwich City Sessions on the 13th January, 1913, of stealing on the 1st November, 1912, a set of harness, and was sentenced by the Recorder to two years' imprisonment with hard labour.

The appellant in person asked for a reduction of the sentence, as more than four years had elapsed since his last conviction, and during the interval he had led an honest life. He also submitted that he took the harness in a temper, and the act was not premeditated.

W. P. Eversley for the Crown. There are five previous sentences against appellant: the last was in June, 1908,—twelve months,—and the last but one was in January, 1907, for housebreaking. Inspector Wentford, when called to give information about the appellant, stated that he could not say anything in his favour. When appellant was last convicted he was cautioned by the judge, and told that if he committed a serious offence again he would be sent to penal servitude.

DARLING J.: The appellant has been convicted of stealing a set of harness, the property of a Mr. Wilby. The appellant alleged, and the prosecutor, Mr. Wilby, denied, that a sum of 10*s*. had been promised to him as a commission on some horse-dealing transaction. Mr. Wilby said he had promised the appellant a sum of 2*s*. 6*d*. only, and had paid him that amount partly

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in cash, partly by treating him. The appellant demanded the balance of the money due to him, and as the prosecutor would not pay, he openly took down the set of harness that was hanging up in front of them and went away with it. The appellant says he took it away in a temper, and intended merely to keep it until Mr. Wilby paid the amount due to him. Unfortunately for the appellant he sold the harness within three hours after taking it away, and the jury have found him guilty of larceny, and the learned Recorder has passed upon him the longest sentence of imprisonment which can be imposed for the offence. It is true that he had been warned in June, 1908, that if he again committed a serious offence he would be sent to penal servitude, but it is a fact that since his liberation in April, 1909, that is to say, for more than three and a half years, no charge has been brought against him, except that in May, 1911, he was fined 2*s.* 6*d.* for using obscene language. On the other hand there is the affirmative evidence that he had been working during that period for Mr. Jeffreys and Mr. Matthews. Taking all the circumstances into consideration we think the sentence too severe, and it will be reduced to nine months' imprisonment with hard labour.

Sentence reduced.

S. M.

ARTHUR FRED HANCOX (*a*).

Leave to appeal granted on the ground that verdict was against the weight of evidence.

The Court has power to receive evidence on affidavit, but will not, as a rule, attach weight to such evidence unless there was opportunity to cross-examine the deponent.

This was an application for leave to appeal against conviction referred by Rowlatt J. to the full Court, and an application for leave to call further evidence.

The applicant, a police constable, was convicted at the Oxford Assizes on the 17th January, 1913, of stealing on

(*a*) See p. 193, below.

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the 12th December, 1912, a marked florin, and was sentenced by Channell J. to six months' imprisonment with hard labour.

Cecil Walsh for the applicant, who had been liberated on bail pending this application. The verdict is against the weight of evidence. The case for the prosecution was that Mrs. Butler, the wife of the licensee of the New Inn, near Wootton, Woodstock, had been missing money and had suspected the applicant, and in order to discover the thief had marked a number of coins including the florin traced to the applicant, and had placed them on the 13th November in an egg-cup which she kept in a cupboard in the kitchen, that the applicant knew that money was kept in this egg-cup for the purpose of giving change when required, that on the 12th December the applicant was alone in the kitchen and had the opportunity of going to the cupboard and taking the money from the egg-cup, that the money was safe in the egg-cup immediately before the applicant entered the kitchen and was missing immediately after the departure of the applicant, that the applicant shortly after, on the same afternoon, bought a pound of butter at a shop for 1*s.* 4*d.*, and paid for it with the marked florin, the subject-matter of the charge. The case for the defence was that the applicant was not alone in the kitchen except for a few seconds at the most, that he could not have gone to the cupboard without running great risk of being seen, as anybody could look or come into the kitchen at any moment, that the amount of his purchases came to 3½*d.*, which he paid for by tendering a half-crown and receiving in exchange the marked florin and 2½*d.* in coppers, and that he spent the florin in buying the pound of butter. It is true that Mrs. Butler swore that the applicant tendered her in payment not a half-crown but a sixpence, and the change she gave him was 2½*d.* only and not 2*s.* 2½*d.*, but evidence was called shewing that applicant had received two half-crowns from a Mr. Adams on the previous evening, and a half-crown was in fact found in Mrs. Butler's cash-box.

It is submitted that the evidence of the prosecutrix, Mrs. Butler, was unsatisfactory from every point of view. At the police court she denied that she had a nephew named Albert Johnson but when pressed with further questions she admitted

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that the said Albert Johnson was her nephew, and that she saw him nearly every day, and that she knew that the applicant had been employed to find out who was the author of certain filthy inscriptions which had been written in the village, that as the result of his enquiries his suspicions had fallen upon Albert Johnson, and that after he had warned Albert Johnson these inscriptions had ceased. The suggestion of the defence was that this charge of stealing a marked florin was trumped up by the prosecutrix in order to avenge herself on the applicant for making charges against her nephew, and also in order to drive the applicant away from the neighbourhood.

It is not only submitted that the verdict of the jury was against the weight of the evidence, but objection is also taken to the constitution of the jury, two of the jurors in consequence of their previous conflicts with the Oxfordshire police being likely to be biassed against the applicant, who was a member of that force. The prosecution was undertaken by the Licensed Victuallers' Association, and at the trial three jurymen who were licensed victuallers were objected to on behalf of the defence, and these jurors left the box. But at the trial the defence did not know that the foreman of the jury had been convicted of drunkenness while in charge of a horse, and several times cautioned by the police for ill-treating his wife and family, and that another member of the jury had been charged by the police with stealing stone. It is submitted that neither of these two men was a fit and proper person to sit on the jury, and if objection had been taken at the time they would have been excluded. From the summing up it is clear that the learned judge formed the opinion that on the evidence it would be unsafe to convict the applicant. The jury took an hour in deliberating before finding a verdict of guilty, and although the Judge passed sentence upon the applicant, he has been admitted to bail pending the hearing of this application. The sentence passed was more severe than it would have been because of a statement made by Inspector Snellgrove, that another publican had missed money on more than one occasion after a visit by the applicant to his house. This information was in fact untrue, and the publican, Mr. Brain, has denied it. I have affidavits on these points.

He was stopped by the Court.

DARLING J.: The Court is of opinion that this application

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should be granted, and that leave should be given to appeal against the conviction on the ground that the verdict was against the weight of evidence. The Court also gives the applicant leave, subject, however, to any objection that may be taken by the Crown, to call witnesses to prove bias on the part of the jury. It does not follow that these witnesses will be heard; it is possible that the Crown may successfully object to them or to some of them. Although the Court is entitled, if it thinks fit so to do, to act upon evidence by affidavit (*b*), it will not as a rule pay much regard to such evidence unless an opportunity has been given to the other side to cross-examine the deponent. In this case the witnesses who have made the affidavits must be in Court and prepared to give evidence if required. We also give the applicant leave to appeal against sentence, and in this connection to call Mr. Brain to deny the statement attributed to him by Inspector Snellgrove, viz., that he, Mr. Brain, had lost several sixpences on one occasion after the applicant had been to his house, and that on a second occasion he had lost a half-sovereign from the till.

Application granted.

Solicitors for the Applicant—*Field, Roscoe and Co.*, for *Stockton, Sons and Fortescue*, Banbury.

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GEORGE DAVIES.

Sections 75 and 80 of 24 & 25 Vict. c. 96, the Larceny Act, 1861, are mutually exclusive: s. 75 is now represented by s. 1 (1) (a) of 1 Edw. 7, c. 10, the Larceny Act, 1901, and the fiat of the Attorney-General is not required for a prosecution under it.

This was an appeal against conviction on a point of law. Appellant was convicted at the Worcester Assizes on the 22nd January, 1913, of fraudulent conversion, and was sentenced by Channell J. to three months' imprisonment in the second division.

He was the treasurer of the Worcester Friendly Slate Society, called also The Old Greyhound Slate Club, and the indictment

(*b*) Under s. 9 of the Criminal Appeal Act, and Ord. 58, r. 4, R. S. C.

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against him, under the Larceny Act of 1901, contained three counts: (1.) That on the 23rd December, 1912, at the City of Worcester, being entrusted by William Lane and others with £64 2*s*. 7*d*. that he might retain the same in safe custody on their behalf, he did fraudulently convert it to his own use and benefit. (2.) That being entrusted with the said £64 2*s*. 7*d*. in order that he might apply the same for the Worcester Friendly Slate Society, he did fraudulently convert it to his own use and benefit. (3.) That having received £64 2*s*. 7*d*. on account of William Lane and others, he did fraudulently convert the same to his own use and benefit.

H. G. Farrant for the appellant (under s. 10 of the Criminal Appeal Act), who was on bail. A prosecution for the offence charged against the appellant cannot be maintained without the *fiat* of the Attorney-General, and that was never applied for or granted. The appellant was indicted under s. 1 of the Larceny Act, 1901, 1 Edw. 7, c. 10, which provides that—

"(1.) Whosoever (a) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody, or apply, pay or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof, or (b) having, either solely or jointly with any other person, received any property for or on account of any other person, fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof, shall be guilty of a misdemeanour, and be liable on conviction to penal servitude for a term not exceeding seven years, or to imprisonment, with or without hard labour, for a term not exceeding two years.

(2.) Nothing in this section shall apply to or affect any trustee on any express trust created by a deed or will, or any mortgagee of any property, real or personal, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage."

This Act of 1901 repealed ss. 75 and 76 of the Larceny Act, 1861, but it did not interfere with s. 80 of that Act, which is still in force, and it is submitted that the offence with which appellant was charged was one included in s. 80, and therefore he was entitled to the protection of the proviso to that section. Sect. 80

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says: "Whosoever being a trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property or any part thereof, shall be guilty of a misdemeanour, &c. . . . . Provided that no proceeding or prosecution for any offence *included* in this section shall be commenced without the sanction of her Majesty's Attorney-General, or in case that office be vacant of her Majesty's Solicitor-General." The use of the words "offence included in this section" as compared with the words "prosecution under this section" used in the next proviso to the same s. 80, is somewhat remarkable. If the difference of language is intentional, the intention must be to give a wider scope to the meaning of "offence included in this section," and the offence charged against the appellant is obviously an offence included in s. 80. The word "trustee" is defined by s. 1 of the Larceny Act, 1861, to mean "a trustee on some express trust created by some deed, will, or instrument in writing, and shall include . . . . any other person upon or to whom the duty of such trust shall have devolved or come." The case of *Fletcher*, L. & C. 180; 8 Jur. N. S. 649; 6 L. T. 545; 10 W. R. 753; 31 L. J. M. C. 206; 9 Cox C. C. 189 (1862); C. C. R., shews that the appellant in this case was a trustee on an express trust created by an instrument in writing. The fact that printed rules of the society were issued, signed by the appellant as treasurer, is sufficient to make him a trustee of the moneys received by him to be held according to the rules of the society, in other words, a trustee on an express trust created by an instrument in writing. *Fletcher* was decided under 20 & 21 Vict. c. 54, "An Act to make better Provision for the Punishment of Frauds committed by Trustees, Bankers, and other Persons intrusted with Property," and the definition of trustee in s. 17 of that Act is similar to the definition contained in s. 1 of the Larceny Act, 1861. Sect. 13 of 20 & 21 Vict. c. 54 contemplated two classes of offences:—(1.) Those included in s. 1 and not included in any other; (2.) Those included in s. 1 and included in some other section. The charge here belonged to the second category. It was no doubt

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an offence under the general terms of s. 1 of the Larceny Act, 1901, but it was also an offence included in s. 80 of the 1861 Act, with which the former Act is incorporated. Sects. 75 and 76 of the Larceny Act, 1861, would not have applied to appellant. *Generalia specialibus non derogant.* The special provisions of s. 80 must prevail over the general provisions of s. 1 of the Larceny Act, 1901. The object of the Legislature was to protect trustees from hasty and ill-considered action on the part of irate beneficiaries. It is submitted that this conviction must be quashed as the consent of the Attorney-General was not obtained before commencing the prosecution.

The Hon. R. Coventry for the Crown was not called upon

PHILLIMORE J.: Mr. Farrant has put his points on behalf of the appellant very clearly and forcibly, but we agree with the view taken by Channell J. at the trial. Under the Fraudulent Trustees Act of 1857, 20 & 21 Vict. c. 54, it was provided by s. 1 that if any person, being a trustee of any property for the benefit, either wholly or partially, of some other person, should, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or purposes, he should be guilty of a misdemeanour. "Trustee" is defined by s. 17 as "a trustee on some express trust created by some deed, will, or instrument in writing." On the statute *Fletcher* was decided. There the prisoner was trustee, treasurer, and secretary, and he was indicted as a trustee, and was convicted by the jury, and Channell B. reserved the point of law for the Court of Crown Cases Reserved as to whether the prisoner was a trustee within the meaning of the Act. The Court decided that he was a trustee within the meaning of the Act, and that he held that position in fact, as well as the other positions of treasurer and secretary, and the Court further decided that he was a trustee on some express trust created by an instrument in writing, because he had accepted office on the terms of a set of rules which at once gave the authority to receive and pointed out the purpose to which the funds were to be applied. The Act of 1857 was repealed by the Act (c. 95) just before the Larceny Act of 1861, s. 75 of which started by dealing with everybody who had been entrusted, either solely or jointly with any other person, with any money

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or security for the payment of money with any direction in writing, to apply, pay, or deliver such money, &c. for any purpose or to any person specified in such direction, and provided that if such person should in violation of good faith and contrary to the terms of such direction in anywise convert such money, &c. to his own use, he should be guilty of a misdemeanour. This section might be regarded as including every kind of trustees, every person who was intrusted with money with a direction in writing as to the application thereof, and in order that it should not include trustees in the ordinary sense of the word, whom one may call gratuitous trustees—*e.g.*, trustees under a will or marriage settlement, a proviso is added to s. 75 to the effect that nothing in the section shall affect any trustee in or under any instrument whatsoever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage. Then comes s. 80, which deals with the class of trustees who are excluded from s. 75, and it is clear that no trustee comes both under s. 75 and under s. 80. These two sections are mutually exclusive. Sect. 80 deals with fraudulent conversion by the special class of trustees excluded from s. 75, and no proceedings can be commenced against them without first obtaining the sanction of the Attorney-General. Sect. 75 dealt with persons who for reward or as part of their work or business were entrusted with money; s. 80 dealt with trustees in the ordinary sense, appointed by an instrument in writing, who for the most part act gratuitously. There was no difficulty under the Act of 1861 in deciding in what cases the *fiat* of the Attorney-General was necessary; offences under s. 75 did not require his *fiat*. An offence included in s. 80 could not come under s. 75. Mr. Farrant attempted to draw a distinction between the words in s. 80, "an offence *included in* this section," and the subsequent words in the same section, "any prosecution *under* this section," but we do not think that the use of the words *included in* instead of *under* in any way enlarges the operation of the section.

Then came s. 1 (I) (a) of the Larceny Act, 1901, which followed s. 75 of the 1861 Act up to a point. It ceased to require as a condition that the offender should have been appointed trustee by an instrument in writing, and it dropped the enumeration of persons who were "agents" set out in the former section, and

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uses the word "whosoever" instead. It took the place of ss. 75 and 76, and did not take or profess to take the place of s. 80. If a man is a trustee under an express trust not created by deed or will, may an offence committed by him come under the 1901 Act, notwithstanding that he is entrusted under some instrument in writing? We agree with the opinion of Channell J. that it may. If the appellant had been indicted under the 1861 Act, he would have been indicted under s. 75, because he was entrusted with money with a direction in writing, and he could not have been indicted under s. 80 of that Act as he was not of the class of trustees referred to in that section. Sect. 75 has been repealed and replaced by s. 1 of the 1901 Act, and the appellant has been rightly indicted under the latter section. It follows that he does not come under s. 80 now, for the repeal of s. 75 has not increased the scope of s. 80; therefore the *fiat* of the Attorney-General is not necessary, and the appeal must be dismissed.

Appeal dismissed.

S. M.

BEFORE

MR. JUSTICE PHILLIMORE, MR. JUSTICE PICKFORD, AND MR. JUSTICE COLERIDGE.

JOSEPH CALLAGHAN.

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Severity of sentence.

Whether under s. 3 of 7 Edw. 7, c. 23, the Criminal Appeal Act, 1907, there is an appeal against conviction for breach of a recognisance, quære.

This was an application for leave to appeal against sentence, which had been referred to the full Court by Pickford J. Applicant was convicted on the 9th January, 1913, at the Central Criminal Court, before Darling J., of sending a letter containing threats to murder his wife, and was bound over to come up for judgment if called upon. On the 7th February he was brought before Ridley J. charged with a breach of his recognisance, and was sentenced to seven years' penal servitude.

Applicant, who was not present, was not represented by counsel.

PHILLIMORE J.: This is an application for leave to appeal against sentence. The applicant had been in September, 1912, sentenced to four months' imprisonment with hard labour for an assault on his wife, and on the 9th January, 1913, was convicted of sending a letter threatening to murder her. Darling J. bound him over to come up for judgment if called upon, and warned him that if he again molested his wife he would be liable to the maximum penalty of ten years' penal servitude. On the 23rd January the applicant met his wife in the street and threatened to murder her; she managed to avoid him, but on the 25th January, on returning home, she found him hiding under a bed to avoid meeting his wife. The appeal does not raise the question which might possibly be raised whether the applicant broke his recognisance. There has not hitherto been any

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such appeal, and having regard to s. 3 of the Criminal Appeal Act, it seems doubtful whether there is an appeal on this point. There is no doubt an appeal from the *quantum* of the sentence, but we doubt whether there is an appeal from the determination whether the recognisance was broken or not. We do not determine this point, and I only mention it lest it might be thought that we had; but there is no necessity to do so here as there is no reason to differ from the view that Ridley J. took. Having regard to the nature of the case, and the warning given to the applicant by Darling J., we do not think the sentence excessive. It is not so much punishment as protection that was sought. If the applicant conducts himself in such a way as to satisfy the authorities that he is not likely to injure his wife they can release him before the expiration of his sentence.

Application dismissed.

A. L. B. T.

GEORGE CHARLES PARROTT.

The word "Enemy" in s. 1 of 1 & 2 Geo. 5, c. 28, the Official Secrets Act, 1911, does not necessarily imply that this country is at war.

It does not follow that because it is open to the jury to find a verdict to convict of a lesser offence than that charged the judge must so direct them.

This was an appeal against conviction on a point of law and an application for leave to appeal against conviction on fact. Appellant was convicted of felony on the 16th January, 1913, at the Central Criminal Court, under s. 1 of 1 & 2 Geo. 5, c. 28, the Official Secrets Act, 1911, before Darling J., and was sentenced to four years' penal servitude.

Tristram Beresford for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant, who had served in the Navy for about twenty-six years, was in 1906 appointed senior gunner in H.M.S. *Agamemnon;* he was there until 1910, when he went to Sheerness in charge of the rifle range, a position which he held until 1912, when he was dismissed from

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the service. In May, 1912, the appellant states he went to a music-hall in London, where he got into communication with a lady; she talked about Ostend, asked if he could ever get over there, and told him if he could to telegraph to her and she would meet him there. She gave him an address, "Richard R. Dinger, 4 Furbringerstrasse, 21 Berlin," on a piece of paper, which was produced at the trial. He said, "This is a man's name," but she replied it was her *nom de plume*. He gave a false name, that of Seymour.

On the 8th July, 1912 the appellant applied for fourteen days' leave, which was granted. On the 11th July he went to Sittingbourne, and sent from there a telegram addressed to Dinger, "Coming eight o'clock Saturday, Seymour." On the 13th July he left Sheerness, being followed by Inspector Gray. He went to Dover, where he took a ticket to Ostend; on the pier Inspector Gray stopped him, and in answer to his inquiries appellant gave his correct name, but stated that he was a civilian. He was taken into an office where he was searched, and the paper with Dinger's address was found on him, as also a signal pad, which shewed, as he then admitted, that he was in the Navy. He was then allowed to proceed, but was followed by ex-Inspector Melville to Ostend, which was reached at 8.30 p.m. According to the Inspector appellant passed through the customs barrier and, after walking from fifty to a hundred yards, a man sidled up to him; no greeting passed between them; they walked together by side streets to the promenade where they sat; after sitting there for some time some people came and sat near them, and they got up and moved to a more secluded corner. They were together from 9.0 to 10.15 p.m., when the stranger got up hurriedly and left; appellant remained there for some five minutes longer and returned to Dover by the 11 p.m. boat. On his return he found that inquiry had been made for him at his private address, and he saw Commander Rideout at the barracks, and then went on leave, but was recalled on the 16th July and was told to put in writing his reasons for going to Ostend; he did so, stating that he went to see a young lady, and that he did not know that he was doing wrong. An investigation was held on the 2nd August, at which he gave many answers which he afterwards admitted were untrue; he said he had been to Ostend to see a young lady who was not there, and that he did not wish her name to be dis-

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closed. On the 14th August he was dismissed from the service, thereby losing a pension of £95 per annum.

In the beginning of September appellant went to live at Battersea, being still kept under observation. On the 16th October he was traced from Marylebone to Hamburg, and later to Flushing and Rotterdam. At the trial seventeen £5 banknotes were produced as having been in his possession, six of which were traced as having come from Germany; also a £20 note as to which appellant gave no explanation. He admitted having had at that time several communications with the man he had met at Ostend, who was referred to at the trial as "Richard," but said that he was trying to get him to clear his character. He was having letters sent to him at a tobacconist's shop in King's Road, Chelsea, one of which was a registered letter, but he stated that he sent that to himself to test whether letters received there were reaching him safely. On the 16th November he called there for a letter, and on leaving the shop was arrested with it in his possession. This letter was from Richard, and was undoubtedly of a most incriminating character, asking him to go to the Firth of Forth to get information about the fleet and enclosing £10 for expenses. Appellant's explanation was that it was the first letter of the kind he had received, and that it was an endeavour to tempt him to become a spy by someone who knew he was down.

The first ground of appeal is, there was no evidence that appellant ever communicated any information. The indictment charged him with communicating information on the 13th July, 1912, but no plans or documents were handed over by him on that occasion.

[PHILLIMORE J.: The date is immaterial.]

No communication at any time was proved; it was only inferred from the meetings at Ostend, Hamburg, and Rotterdam. The questions asked in the letter received by appellant on the day of his arrest were not on points as to which he would have had any particular knowledge, and there was no evidence that he obtained it.

Secondly, the judge misdirected the jury At the suggestion of the counsel for the Crown, he read to the jury s. 1 (2) of the

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Official Secrets Act, 1911, which is as follows: "On a prosecution under this section, it shall not be necessary to shew that the accused person was guilty of any particular act tending to shew a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document or information relating to, or used in, any prohibited place within the meaning of this Act, or anything in such a place, is made, obtained, or communicated by any person other than a person acting under lawful authority, it shall be deemed to have been made, obtained, or communicated for a purpose prejudicial to the safety or interests of the State unless the contrary is proved," and he then went on to say, "The moment you are satisfied that anything confidential has been communicated, it must be presumed that it was communicated against the interests of the State unless the defendant satisfies you that it was not communicated prejudicially to the State." This must have suggested to the jury that the whole *onus* lay on appellant to prove himself innocent, whereas the words "unless the contrary is proved" only apply to the latter part of the sub-section.

Further, the judge misdirected the jury by failing to point out that it was open to them under s. 5 to find appellant guilty of a misdemeanour under s. 2 of the Act. In a case where there was much prejudice against him the jury ought to have had an opportunity of convicting him of the lesser offence.

Lastly, the prosecution was commenced without the assent of the Attorney-General, as required by s. 8.

[PICKFORD J.: The proviso to the section covers that point.]

I am informed that although the appellant was brought before the magistrate on the 18th November, 1912, only evidence of arrest was given then, and the assent of the Attorney-General was obtained on the following day; therefore I do not press that point.

Bodkin, Travers Humphreys and *G. A. H. Branson* for the Crown, were not called upon.

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PHILLIMORE J.: This is an application for leave to appeal against conviction on fact, and an appeal based on suggested points of law. The appellant was convicted under the Official Secrets Act, 1911, of one of the felonies mentioned in s. 1. He was charged with having communicated information calculated to be useful to an enemy, such as the position and movements of warships. Now the evidence of communication is, as one would expect, inferential. It was proved that appellant had confidential information in his possession; he held the rank of a warrant officer in the Navy, namely, that of a gunner; it was proved that having that rank, with its corresponding duties, he had opportunities of acquiring, and would acquire, such confidential information; that he had been found communicating in a suspicious manner with suspicious persons, telling lies about it when detected, and in the possession of considerable sums of money, much of which was traced to have come from sources which pointed to the fact that the suspicious persons had bought information. He admitted ultimately that he was in communication with one at least of these persons, and that this person was trying to turn him into a spy, but said that he had only just discovered the fact.

Generally speaking, the facts of the case were these. Being employed at Sheerness appellant obtained fourteen days' leave, and gave an address in the West of England as his destination. He attempted to cross to Ostend, after sending a telegram to Berlin indicating the particular day on which he would arrive. He was stopped at Dover by a police officer, when he disclosed his name, but said he was a civilian; he was searched, which resulted in the fact that he was in the Navy being disclosed. He then said he was unaware that he might not leave the country. We can understand that a trip to Ostend and back, although against the letter of the law, might not be regarded as a very serious matter. He then crossed to Ostend, where he was watched; a stranger sidled up to him, and they went by devious roads to the promenade, where they engaged in earnest conversation, and moved away when others came near them. They parted when the stranger had to hurry to catch his train, with a hearty handshake. The appellant returned to England by the next boat, and was proceeding to the West of England when he was telegraphed for, and called on to explain his movements. The only matter of importance disclosed was a little piece of paper found on him

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hearing these words: "To Richard Dinger, 4 Furbingerstrasse, 21 Berlin. With much love, Yours, R." His account of this was that a month before he had met a lady at a music-hall; she was said to be the companion of another lady. She said she was anxious to see him again, and suggested that he should come to Ostend; she tore off the paper as an address at which he could communicate with her; it being clearly not her name she explained that it was the name under which she wrote or the name which would find her. He suggested that without any previous arrangement, without knowing if he would meet her, or if she would be able to get away, he had gone to Ostend, and that the man he met had come to say that she could not get away, but satisfied him of her continued hope that she would meet him again. This explanation was not considered satisfactory by his superior officers, and he was discharged from the Navy. We have seen the piece of paper, and it seems to us that the jury might well come to the conclusion that the letter was written by R. Dinger to someone, probably the prisoner, giving an address at which he might communicate with him, and ending in a way intended to suggest that it was written by a lady.

After his dismissal he was watched and seen to go from Grimsby to Hamburg, returning in possession of a large sum in English banknotes. He admitted going to Hamburg, but not until it was proved. It was also proved that he took another journey to Flushing and met the same man he had met at Ostend. He said that on one occasion he met the lady and gave her a false name. He started receiving letters at an address in London under the name of Couch. Several reached him there, one of which was a registered letter; he explained that he sent this to himself to see if his post office was satisfactory. He was finally arrested with a letter in his pocket which would incriminate him as deeply as possible, if any letter to him could incriminate him. It read as follows: "November 14th, 1912. Dear Mr. Couch, I am very much obliged to you for your prompt reply to my last letter. Now I beg to place in your hands some questions as addition to my last letter. Have the kindness to leave as soon as possible for Firth of Forth, ascertaining about the following. Which parts of the fleet are in or off the Firth of Forth since November 5th? Only the vessels of the first and eighth destroyer flotillas or which other men-of-war of any kind else? Where is the second destroyer flotilla

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now? Have there been mobilising tests of the flotillas and coast defences in the Firth of Forth? What are the flotillas doing or proposing now? What number of Royal Fleet, Class A, are called in now for the yearly exercise? Are any of these men kept longer than a fortnight? I think it will be necessary to stay some days . . . . Enclosed £10 as travel expenses for the last and this journey. Please tell me in the next letter after having returned to London your expenses, that I can hand you the balance if the £10 should not do it. I beg to keep yourself ready if possible also in the next future to run over immediately to any place, as soon as rumours as to extraordinary preparation of material and personal are running. In such a case please do not wait until you have received an order from me, but leave on your own accord and at the same time send your address and make your doing known to me with particulars of the reason. Yours truly Richard." He had opened a bank account with several bank-notes, six or seven of which had been traced to have been taken recently to Germany. There were other matters which it is not necessary to mention. There was evidence on which the jury might believe that appellant had information and must have communicated it on one or other or all of these voyages, and that the money was for the hire of his services. His own suggestion with regard to the letter was that when he was known to be down they tempted him to become a spy, and had already asked him to write articles on English naval matters.

When the statute uses the word "enemy" it does not mean necessarily some one with whom this country is at war, but a potential enemy with whom we might some day be at war. The jury, after being directed on the subject, found appellant guilty, and the first point taken, that there was no evidence of communication of information, in our opinion fails.

Then Mr. Beresford in his very able argument complained of the summing-up. The judge explained that the burden of proof lay on appellant of shewing that if any information had been communicated it had not been done for a purpose prejudicial to the safety or interests of the State, and it is suggested that this was so weightily expressed that it might seem to throw on him the *onus* of disproving the whole charge. It is clear that it did not do so, and therefore that point fails also.

Also, as it would have been possible for the jury to return a

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verdict of guilty of a misdemeanour under s. 2 of the Act, it is suggested that the judge ought to have directed them on this point. There may be cases where, in the interests of the prisoner, a judge ought to do so; there are certainly many cases where the interests of justice are not met unless it is pointed out to the jury that they may convict of a lesser offence, or, thinking it a case of "neck or nothing," they may acquit altogether. It was not necessary to do so here.

The last point that the prosecution was instituted without the consent of the Attorney-General has been dropped. The Court is of opinion that the appeal must be dismissed. There is no reason to say anything as to the sentence or the date from which it is to run. We leave it to run as provided by law.

Appeal dismissed.

A. L. B. T.

ARTHUR FRED HANCOX.

The Court will not as a rule hear evidence as to the character of individual jurymen.

The Court will not set aside a verdict on questions of fact except on the strongest evidence.

This was an appeal against conviction and sentence by leave of the full Court (see above, p. 176), and an application to call further evidence.

Cecil Walsh for the appellant, who was on bail. The grounds in my notice of appeal are, first, that the verdict was against the weight of the evidence, and, secondly, that the character of two of the members of the jury was unsatisfactory; on this point I do not suggest that it is of much account independently of the first ground, but it may be an explanation of the fact if the verdict is found to be against the weight of evidence. Having regard to the responsible position occupied by appellant, and the nature of the defence set up, I cannot suggest that the sentence was exces-

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sive. There are several small points which tend to shew that the evidence of the prosecutrix, Mrs. Butler, was unreliable. She suggested that appell nt came to her inn in uniform at a time when the police book shews he was off duty, and therefore would not have been wearing uniform. She suggested that appellant was alone in the kitchen, where the marked florin was kept, for three minutes, but she admitted having met the postman coming in as she was going to the cellar to get appellant's beer, so the time he was alone must have been considerably shorter than this. She went upstairs to fetch a cash box, and in cross-examination said she went to see if the marked two-shilling piece was there, whereas at the police court she said she knew it was in the egg-cup.

The prosecution tried to force me to call the postman; I did not do so as I thought on Mrs. Butler's admissions I should secure an acquittal. He gave evidence before the magistrates which I must admit did not help appellant, but the depositions were not put in at the trial.

[PHILLIMORE J.: Still the Court may look at the depositions to see whether there has been a miscarriage of justice.]

Mrs. Butler admitted having prevaricated on the subject of her nephew. The prosecution said that a plot by the family was suggested, but the summing-up made it clear that the jury had to choose between Mrs. Butler's story and appellant's. It was clear on the evidence that the florin was stolen, if at all, while Mrs. Butler was in the cellar, but although appellant was in the inn for ten minutes after her return she never challenged him with the theft; he did not pick up his change until on the point of leaving, and as it was suggested that the florin was among this change this may be the reason why he was not accused of the theft sooner. The summing-up, although in favour of an acquittal, did not draw the attention of the jury to these discrepancies.

I wish to call evidence as to the character of the foreman of the jury, but I do not wish to call any evidence as to what was said by Inspector Snellgrove after the verdict.

Evidence by two police officials was given to the effect that

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the foreman of the jury had been convicted of drunkenness in August, 1911, and four times cautioned by the police for ill-treating his wife and children when under the influence of drink; also that another juryman had been charged in a police court but discharged. It was not suggested that either of these jurymen knew appellant; they came from a part of the county different from that of his station.

Ernest Walsh for the Crown. This is an appeal purely on fact, and the Court has been asked to sit as a jury, which it has consistently refused to do. The jury saw the witnesses in the case and had an opportunity of judging their reliability; they were told if they were in any doubt to give the prisoner the benefit of it. For this appeal to succeed it must be shewn that the verdict was unreasonable, or that there was no evidence to support it, but neither can be alleged. As to the postman I suggest that appellant told a deliberate lie, and I naturally suggested to the jury that this was the reason why the postman had not been called to give evidence, as he would have stated that he was not in the inn at the time appellant alleged he was. While it is true that Mrs. Butler became confused under cross-examination, this may have been due to ill-health; she had fainted when before the grand jury.

On the question of the jury, if they were liable to challenge there would be no ground for granting a new trial, even if the Court had power to do so. The Court ought not to quash a conviction unless before the Criminal Appeal Act it would have granted a new trial or a *venire de novo*. See *Wardle*, Car. & M. 647 (1842; prisoner having a relative on the jury), and *Sutton*, 8 B. & C. 417; 6 L. J. (O. S.) M. C. 102 (1828; alien juror).

Cecil Walsh in reply.

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PICKFORD J.: This case has given the Court some reason for consideration. Appellant was charged with stealing a two-shilling piece from a public-house in a village which formed part of the district where his duty as a police constable lay. The story for the prosecution was that the wife of the licensee had on pre-

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vious occasions missed money after appellant had been in the house, so she marked a two-shilling piece, and put it in an egg-cup where she kept her money, and placed it in a cupboard in the kitchen; she did that because appellant knew where she kept her change. On the day in question she said she saw appellant coming to the house; she was then upstairs, but she went downstairs to see if the florin was still in the egg-cup and found that it was. She went upstairs again, but returned when appellant came into the kitchen; he ordered some beer and some cigarettes; she had to go to the cellar to get the beer, leaving appellant alone in the kitchen. While she was out of the room the postman came, and on her return he and appellant were talking. There is a conflict of evidence as to the exact time at which the postman arrived; if it is allowed that he arrived at the moment suggested by the defence, the time that appellant was alone in the kitchen was considerably less than is suggested for the prosecution, but the Court does not think it material to decide which is right, because either time was sufficient to allow of the money being taken, the cupboard being close at hand. The woman then says that appellant paid for the beer and cigarettes with a sixpence and was given $2\frac{1}{2}d.$ in change; she says he did not pay her with a half-crown as he suggests. As soon as he had left she went to the cupboard and found that the florin was missing, and she then gave information to the police. The superintendent saw appellant and questioned him; the florin was found to have been given by him in payment for some butter at a farm soon after leaving the public-house. If the evidence for the prosecution is believed there was a strong case against appellant. His story was that he did not pay for his beer with a sixpence but with a half-crown, receiving $2s.$ $2\frac{1}{2}d.$ in change, and it was suggested that the florin had been given him in the change purposely in the carrying out of a plot against him. The reason suggested for this is that things had been lax in this police district, and that appellant, who had been stationed in another district, as a good officer was sent there; it is said that he had had occasion to warn the nephew of the prosecutrix with regard to some misconduct and so had incurred ill-feeling, and it is suggested that this was done by way of revenge. This statement of the facts seems to shew that it was a question for the jury which side they believed, the evidence on either side being uncorrobo-

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rated; no exception can be taken to the summing-up, which was in favour of appellant. There is another matter, namely, that it is suggested that the woman's demeanour and manner of giving evidence shewed that she ought not to be believed; it is said that she simulated hysterics; it is also said that the demeanour of appellant was not such as to commend itself to those in Court, but these were entirely matters for the jury.

It is also said that the jury were so constituted that a fair trial was not likely to result, and we have been asked to hear evidence on this point; we thought it desirable to hear the evidence, but it must not be thought that our admission of the evidence is to form any precedent. The foreman of the jury is said to have been convicted of being drunk when in charge of a horse and cart, and to have been warned for ill-treating his wife and children; appellant had nothing to do with this and it happened in a part of the county far from the districts where he had been stationed. Then it is said that another member of the jury had been charged before the magistrates and discharged, and it is suggested that the presence of these two persons would prevent the trial being satisfactory, and that the action of the police in their cases would have created a prejudice against every member of the police force. The Court does not think such an inference necessary; it has the jury list before it, and, with the exception of these two, all the jurymen occupy satisfactory positions and come from all parts of the county. It is not likely that the other ten jurymen would have been influenced by these two even if any bias existed.

This Court has said that it does not proceed on such lines as these—look at the evidence, see what conclusion the Court would have come to, and set aside the verdict if it does not correspond with such conclusion. There have been cases where the Court has thought fit to set aside a verdict on a question of fact alone, but only where the verdict was obviously and palpably wrong. Such cases are rare. This case turned on the manner in which the witnesses gave their evidence; there was a proper direction to the jury, and the Court does not see that it can interfere with the verdict without substituting itself for the jury, which was the proper tribunal to decide the matter. It is not necessary to say whether we should have given the same verdict. If the verdict was right the sentence was not excessive, but the days which

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appellant has been in custody may be allowed to count in the sentence.

Appeal dismissed.

Solicitors for the Appellant—*Field, Roscoe & Co.* for *Stockton, Sons and Fortescue*, Banbury.

A. L. B. T.

GEORGE EDWARD PRIDMORE.

If two persons are engaged in a common unlawful enterprise, and one of them, to avoid apprehension, attempts murder, both may be found guilty of the felony if the jury are satisfied from their conduct at the time that at any moment there was a determination on the part of each to aid the other in escaping arrest; but if it can be ascertained which actually made the attempt, the sentence on him should be the heavier.

This was an appeal against conviction on a point of law, and an application for leave to appeal against sentence and to call further evidence. Appellant was convicted on the 22nd January, 1913, at the Northampton Assizes, before Bankes J., of shooting with intent to murder, and was sentenced to twelve years' penal servitude, as was his fellow prisoner.

Sir W. Ryland Adkins (with him *C. K. Tatham*) for the appellant, who was present. The appellant was tried with a man named Ironmonger, and both were convicted. The facts were as follows: On the early morning of the 22nd December, 1912, the two prisoners were out poaching, one of them carrying a gun adapted for poaching with the barrels cut short, and the other a stick and a bag containing a recently shot pheasant. Three keepers were watching in the neighbourhood, and hearing a shot fired in the direction of Titchmarsh Wood, they went in that direction, hid behind a hedge, and saw the two prisoners come out of the wood and walk past them towards another wood called Priest's Coppice. When the poachers had passed the keepers rushed out after them, and got within five yards of them when they were discovered. Both prisoners turned round, and the one with the gun shouted "Stand back," covering them all in turn with his gun. One of the keepers, named Shaw, went for the man with the gun,

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and the other two for the man with the stick, who backed towards the wood, holding his stick over his left shoulder in a manner which was indicated by the witnesses. The man with the gun shot Shaw, seriously injuring him; the other keepers went to his assistance, and the poachers ran away. The greater part of the case was occupied in ascertaining which of the two prisoners fired the shot; the three keepers said it was the appellant, but they differed as to whether he was the nearer to the wood and on other details. The jury ultimately returned this verdict: "We find both guilty of intent to murder; we are unable to say which of them fired the shot."

"Bankes J.: 'But are you agreed that it was done as the result of the common purpose or intent to offer resistance even to the extent of firing if there was an attempt at apprehension?'

The Foreman: 'We are agreed that the intention was to prevent arrest at all costs, even to the extent of murder.'

Bankes J.: 'And that both were acting in the common purpose of doing that?'

The Foreman: 'We are agreed on that.'"

My first ground of appeal is that there was no evidence on which the jury could return such a verdict; there is nothing in the shorthand note to justify the verdict unless the attitude in which the appellant (as he says) held his stick, as indicated by some of the witnesses, supports it; it is true that the prosecution suggest that this was a threatening attitude, but the defence say it was merely a defensive attitude. Even if the attitude was unmistakeably threatening it would not justify the conviction.

The summing up dealt mainly with the question, which prisoner fired the shot, and then the judge went on to deal with the question of a common design, and he added: "I think I may go a little further; because I think the law is that, if you think that, although it was not arranged between them, the nature of the enterprise was such that both must have realised that resistance at all costs was likely to happen, then you might find them both liable, though I should hesitate to do so myself." It was, I submit, for the judge to decide whether there was any evidence of a common design, and as to whether the occasion was of such a character that it must naturally follow that resistance would be made to the point of murder; but a little later in the summing up the judge said: "I will ask you whether you think there is any evidence here that

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these men were engaged in a common unlawful enterprise—well, of course they were that—and that there had been any arrangement between them that if apprehension was threatened in course of the fight they would resist apprehension at all costs."

[PHILLIMORE J.: We all agree that what he meant was whether there was sufficient evidence on which the jury could convict. He meant to decide that there was evidence to go to the jury.]

Then that decision was wrong; there was no evidence of any common design to injure, nor was there time for consultation when they found the keepers upon them; further, there was no evidence that the nature of the enterprise was such that both knew that it might lead to resistance to the bitter end; there were only two men, and the weapons they had were those appropriate to poaching. The cases shew that neither the possession of a gun, nor an agreement to poach, is evidence of an intent to resist to all extents. If the shot was fired in consequence of the attack by the keeper, it could not have been fired in pursuance of any common design: *Luck*, 3 F. & F. 483 (1862).

[LORD COLERIDGE J.: In Russell on Crimes and Misdemeanours, 7th ed., p. 762, it is stated that the report of this case is probably erroneous.]

Even if it is thought that the appellant raised his stick aggressively and intended to resist arrest, it is no evidence that he intended to resist to the point of murder.

[LORD COLERIDGE J.: See Russell on Crimes, p. 759: "Where several persons come to a resolution to resist all opposers in the commission of a breach of the peace, and to execute it in a manner naturally tending to create riot or tumult, *e.g.*, by going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must, at their peril, abide the event of their actions. And therefore if in doing any of these acts they happen to kill a man, they are *all* guilty of murder."]

That is referring to unlawful assembly and riot; here the enterprise was merely trespass The judge is bound by *Dodd-*

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ridge, 8 Cox C. C. 335 (1860), where it was held that a common intent to poach does not sustain the allegation of a common intent to wound. See also *Skeet,* 4 F. & F. 931 (1866); *Price,* 8 Cox C. C. 96 (1858) (which is probably inaccurately reported; see Russell on Crimes, p. 762), and *Howell,* 9 Car. & P. 437 (1839).

Dyer (with him *Carr*) for the Crown. The authority on which the judge based his direction to the jury is probably to be found in Russell on Crimes, 7th ed., p. 114: "It is submitted that the true rule of law is, that where several persons engage in the pursuit of a common unlawful object, and one of them does an act which the others ought to have known was not improbable to happen in the course of pursuing such common unlawful object, all are guilty." No case is quoted in support of this proposition.

[PICKFORD J.: If such an act is probable in the course of night poaching there would be a common purpose in every case.]

It was a question for the jury what happened when the keepers advanced on the poachers; where the evidence of keepers and poachers differed I am entitled to say that the jury believed the keepers. The acts of the poachers shewed the state of their mind; one of them was armed with a stick, which might be considered a weapon of offence or defence; it was for the jury to say which; this man stood his ground until the gun was fired. All the facts may be capable of two constructions, and if the construction preferred by the jury is one which can be placed upon it by reasonable men their verdict should stand. *Edmeads,* 3 Car. & P. 390 (1828), is strong in my favour, though there the facts were certainly stronger. See the summing up of Garrow B. in *Collisson,* 4 Car. & P. 565 (1831). The fact that the men were out night poaching, and their behaviour when discovered, are evidence on which it was open to the jury to find that the nature of their enterprise was such that resistance at all costs was likely to happen.

Ryland Adkins. *Edmeads* is in my favour, as the man with the stick in the present case was retreating, and so separating himself from the other poacher. *Skeet* shews that a change has taken place in the judicial view as to the doctrine of constructive complicity.

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PHILLIMORE J.: The Court has given this case careful consideration, and we are obliged to counsel on both sides for their assistance. There is no doubt that the case was tried under considerable difficulty. The two prisoners were out poaching by night, and one or other of them fired a shot which nearly killed the keeper Shaw. The main part of the case was directed to the question, which of the two fired the shot, but all through the case counsel for the prosecution contended that if the jury found that the two men were acting with a joint purpose it might be unnecessary to decide which of them fired the shot, and, while the summing up dealt principally with the first question, the judge also left to the jury the question whether the firing was so much the result of a common purpose that both prisoners were in law guilty of an attempt to murder. The fact that the summing up shews that the judge's own leaning was against this view gives further strength to the verdict of the jury. One phrase in the summing up has been properly criticised: "Now, gentlemen, I will ask you whether you think that there is any evidence here that these men were engaged in a common unlawful enterprise—well, of course they were that—and that there had been any arrangement between them that if apprehension was threatened in course of the fight they would resist apprehension at all costs. If you think there is any evidence of that, or if you are satisfied that there is evidence of that upon which you ought to act, then of course you will find them both guilty, and it would not matter which fired the shot." That much cannot be questioned. "Or if you think that there had been no previous arrangement between them, but that the nature of the enterprise was such that both must have realised that resistance at all costs was likely to happen; if you are satisfied of that you would be justified in finding both guilty, although you are not satisfied which fired." Sir Ryland Adkins says there is nothing "in the nature of the enterprise" which was night poaching with weapons suitable for poaching, although they may also be useful weapons if attacked, from which such an inference can be drawn, and he suggests that there was no evidence on which the judge could leave this question to the jury. Mr. Dyer says we must look at the conduct of the two men as well; that it is not necessary that there should have been a formal agreement, but that it may be inferred from their conduct at the time that they went out not merely for poaching, but to

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escape arrest if possible, and to assist each other to escape. So qualified or glossed it is not necessary to criticise the summing up; if not so qualified or glossed it is not absolutely correct; on the broad view the Court is satisfied that the judge did not err in his summing up to the jury.

Then the point was taken whether there was any evidence to be left to the jury, or to justify the finding, of a common purpose. It really comes to what was the attitude, or what were the gestures, of the man with the stick. If having a stick three feet six inches in length he faced about on the call of "Stand back," or to see what happened, and if he held his stick in a threatening attitude and in that way supported his comrade, one man shewing that he would shoot, and the other that he would strike, even if retiring, as he might well do to give the other man time to fire, the jury might then find that each man shewed fight for himself and his comrade with the weapon he had handy. Though there is not much evidence on the point, there is some if the gestures supported the suggestion, and therefore the appeal must be dismissed.

We wish to add a word on another matter. There is a good deal to support the suggestion that the other man fired, and although in law both are guilty, if it is clearly established that one fired the shot the sentence on the other might well be reduced. If there is additional evidence to shew that the other prisoner fired the shot it would be proper to submit it to the Home Secretary, and we think that if he is satisfied on the point it would be proper to reduce the sentence on the appellant by the clemency of the Crown; but it is not a matter with which this Court can deal.

Appeal dismissed.

Solicitor for the Appellant—*J. Prentice,* Northampton.

A. L. B. T

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ETHEL BECKETT.

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The opinion of a person not an expert on the value of a thing may be given in evidence.

The Court will mark its disapprobation of frivolous appeals by disallowing the running of the sentence from the date of conviction.

This was an appeal against conviction on a point of law. Appellant was convicted on the 7th February, 1913, at the County of London Sessions, of doing malicious damage to the extent of over £5, and was sentenced to three months' imprisonment in the second division.

Blanco White for the appellant, who was not present. The damage was done to a plate glass window of the Post Office in Dover Street, and the only evidence of value was given by a man who described himself as Acting Assistant Superintendent in the General Post Office, who gave the value as £8; in cross-examination he said he was not a glass expert, but that the window had been examined by the Clerk of the Works to the General Post Office, who had given the damage as £8; there was no re-examination. This was merely hearsay evidence, and the appellant was denied the opportunity of cross-examining the man who knew the real value of the glass. In another case at the same sessions such cross-examination shewed that though the Government were charged over £5 for replacing the window, its real value was under £5. She was not represented by counsel at the trial, so no submission was made that there was no evidence to go to the jury.

Travers Humphreys, for the Crown, was not called upon.

PHILLIMORE J.: The point raised is ingenious, but it has no substance. It is said that there was no evidence as to the value of the window; there was no controversy as to its value, but of course it had to be proved. A witness was called who said he had no expert knowledge; he was authorised by other people to say it was worth £8, but he was prepared to say as his own opinion that that was its substantive value. There was no

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particular virtue in the sum of £8 if the value was over £5. The Court is of opinion that the appeal should be dismissed. The sentence may not date back to the date of conviction as we consider it a frivolous appeal.

Appeal dismissed.

Solicitors for the Appellant—*Hatchett Jones, Bisgood & Marshall*

A. L. B. T.

BEFORE

MR. JUSTICE CHANNELL, MR. JUSTICE BRAY, AND MR. JUSTICE COLERIDGE.

EDWARD HENRY PALMER.

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The provocation which in the case of a wife is admitted as an exception to the general rule that provocative words cannot reduce murder to manslaughter is not to be admitted in the case of another woman.

This was an application for leave to appeal against conviction. Applicant was convicted of murder, on the 19th February, 1913, at the Bristol Assizes, before Lord Coleridge J., and was sentenced to death.

J. G. Trapnell for the applicant (under s. 10 of the Criminal Appeal Act), who was not present. This application is based on misdirection. The applicant was convicted of murdering a girl named Ada Louisa James, with whom he was on affectionate terms; he had been abroad, but since his return had spoken to her father on the subject of marriage, and at Christmas had given her an engagement ring. On the 25th January, 1913, he tried to get a revolver out of pawn, but failed, as he had lost the pawn-ticket; his explanation was that he wished to sell it; on the 26th January he bought a razor; on the 27th January he went to the girl's house, where he appeared quite friendly towards her; that evening he was seen walking with her by two people, one of whom said they appeared to be on friendly terms, and the other of whom said they appeared to be quarrelling. Shortly after that the girl was found with her throat cut, and her engagement ring was found in a pool of blood some 200 or 300 yards away. Appellant went to another part of the town, where he bought some laudanum, writing-paper, and a pencil: on the following morning he was arrested with the blood-stained razor, a letter to his mother,

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and an empty laudanum bottle in his pocket. While in prison he wrote letters practically admitting that he had killed the girl.

The defence was that the girl was killed suddenly in consequence of great provocation, and that therefore the verdict ought to be one of manslaughter. As an explanation of the purchase of a razor, evidence was given that appellant had been seen by his sister holding his razor to his throat on the night of Saturday, the 25th of January; that he had subsequently dropped it in the kitchen while under the influence of drink, and that the sister finding it there on the Sunday morning, and fearing that he would do himself an injury, had buried it in the garden; that appellant had asked for it on the Sunday morning, and being unable to obtain it, had purchased another razor to shave with. The razor hidden by the sister was dug up from the garden after his arrest, and produced in Court. The evidence for the defence also shewed that he had been courting the girl for five years, had been in Canada and returned on the 22nd December, since which time his conduct had been excitable and he had been drinking. Appellant said that on the 25th January he had spoken to the girl about the difficulty of getting employment and said he would go abroad and send for her as soon as possible; on the 27th January there was a further conversation on this subject, when the girl said if he went away she would go on the town; he asked her if she meant it, and she said "Yes, I have done it before and I will do it again," and taking off her ring threw it in his face; then he killed her. He stated that he had been cohabiting with her.

In the summing up the real defence of provocation was never put to the jury, and the direction given them by the judge was such as to make them think they were precluded from returning a verdict of manslaughter. He said: "When I speak of provocation, it is not every chance act or word that may irritate that is provocation in the eye of the law to reduce the crime from murder to manslaughter. You must take it from me when a deadly weapon is used, no words or gestures, however opprobrious or provoking, are considered in law sufficient to reduce the crime from murder to manslaughter; that is the law." And again at the end of his summing up: "I have also pointed out to you that no provocation by gesture, and no provocation by words, however opprobrious, in the case where a deadly weapon is used, can, in law, reduce the crime from murder to manslaughter. It is only

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provocation in act, it is only something of that kind, something substantial possibly, that in law can reduce the crime to anything less than the crime of murder." The jury must have thought from this that even if they believed appellant's evidence they could not find manslaughter; this would not be in accordance with *Smith*, 4 F. & F. 1066 (1866), where a trivial assault (either by spitting on or at defendant), coupled with words of great insult, was held to be sufficient.

[CHANNELL J.: Here it was a reference by the deceased to herself, not an assault on, or insult to the person who killed her. Is there authority that that is sufficient?]

Yes, *Rothwell*, 12 Cox C. C. 145 (1871), which is the case where the parties were husband and wife, as these two practically were. In that case Blackburn J. directed the jury that if a husband, suddenly hearing from his wife that she had committed adultery, he having had no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter. That was followed by Bucknill J. in *Jones*, 72 J. P. 215 (1908). These cases shew that the test is the effect such a confession, suddenly made, is likely to have on a reasonable man's mind. Here there was such a confession, for the girl said "I have done it before." The fact that the parties were not married makes no difference, because the effect produced on the mind by the confession depends on their affectionate relations, which is no less strong for being illicit.

Further, there was a misdirection as to the facts which corroborated appellant's story, especially as to the innocent purchase of the razor and the attempt to redeem his revolver; the absence of a proper direction on these points may have prevented the jury adding a recommendation to mercy to their verdict.

S. H. Emanuel and *R. G. McDonald* for the Crown were not called upon.

CHANNELL J.: In this case the Court is of opinion that there is no ground for granting leave to appeal. The substantial point taken to-day is that the judge misdirected the jury on the question what amount of provocation is sufficient to reduce the crime from

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murder to manslaughter. We do not consider that the judge absolutely withdrew this question from the jury, but we agree that he so put it that the jury, respecting as they do the opinion of judges, could not have been expected to find a verdict of manslaughter. The question is whether he was wrong in doing so. It seems clear to us that if a verdict of manslaughter had been found it would have been entirely wrong on the evidence; there was nothing which would really have justified such a verdict. The judge laid down the well-established rule that words alone, except in very exceptional circumstances, are not sufficient provocation to reduce the crime to manslaughter. As to what, if any, are the exceptional circumstances which would make words a sufficient provocation, no case has been brought before us, and there is no case to suggest that words are sufficient, except cases relating to the confession of adultery by a wife to her husband. It is settled law that a husband discovering his wife in the act of adultery may be expected to be so provoked that the killing of his wife or the adulterer is not murder, but manslaughter. Blackburn J., Bucknill J., and some other judges, including myself, have thought that the exception might fairly be extended to the sudden discovery by the husband of the fact of adultery. That is in a way an exception to the rule, because the confession is in words, but the reason is that the nature of the words render the confession equivalent to the discovery of the act. That is the only exception. Here the parties were not married, and whatever their relations they were not even those of living together although unmarried, although possibly connection had taken place between them. That is a very different case to a case of adultery, and supposing the girl had been found by appellant in the act of connection with another man, there is no authority that that would be sufficient to reduce the crime to manslaughter. The consequence is, that it is quite impossible to treat words which might mean that she had had immoral relations with other men as at all of the nature of those which have been held sufficient to justify a verdict of manslaughter. Therefore, if the effect of the summing up was that, even if the jury believed the evidence of appellant, they ought still to return a verdict of murder, it was, in our opinion, right.

Another matter suggested is that the judge went too far in the way he dealt with the question of premeditation; if there

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was clear premeditation that put an end to the question of manslaughter, but it is not necessary that there should be premeditation in the sense of an intention to kill at some previous time if there was an intention to kill at the time of the murder.

A further matter raised is that some of the judge's observations are said not to have been quite correct, and may have had the effect of preventing the jury from recommending appellant to mercy. We think that that is a question we cannot entertain at all. Such a recommendation is not always followed by the Home Secretary, but the reasons are considered whether the sentence should be reduced or not. Appellant's position is in no way prejudiced; he is still equally entitled to petition the Crown through his friends. The appeal must be dismissed.

Appeal dismissed.

A. L. B. T.

WILLIAM DAVIES.

Where intent is an ingredient of a crime, there is no onus *on defendant to prove that the act alleged was accidental.*

This was an appeal against conviction on a point of law. Appellant was convicted on the 30th January, 1913, of shooting with intent to resist lawful apprehension, at the Ruthin Assizes, before Lawrence J., and was sentenced to eighteen months' imprisonment with hard labour.

A. S. Comyns Carr for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. On the night of the 24th November, 1912, appellant was out poaching with his brother Evan and a man named Hughes; Evan had shortly before bought a gun, and on this night had lent it to appellant, who was inexperienced in the use of firearms. As they were coming out of a plantation they were seen by two keepers, who pursued them, there was a wall along the road over which the Davieses climbed, and ran in opposite directions along the road. A keeper named Cameron ran after appellant, and had gone about sixty yards down the road when appellant turned round and the gun went off (to

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use a neutral expression), hitting Cameron, who was three or four yards off, in the shoulder. Appellant then rejoined his companions. Two days later he was questioned by a police constable, to whom he denied being out on that night at all; he then consulted his solicitor, and when next questioned by the police he referred them to him. The defence raised was that the gun had gone off accidentally, and although Cameron's evidence was very precise, and pointed to intentional shooting, Hughes, who gave evidence for the prosecution, stated that appellant had told him shortly after the event that the gun had gone off accidentally, but that he did not think any harm had been done: appellant himself gave evidence in support of this defence.

The ground of this appeal is that the judge misdirected the jury as to the *onus* of proof. He said: "Of course any of us may discharge a gun by accident, and that would not be within the indictment, and therefore that is the whole question, but it is for the prisoner—not for the prosecution—to satisfy you that this happened accidentally." This, it is submitted, is not the law, and the explanation of the mistake may possibly be found in a passage which preceded it. "The law upon the subject is this, that a man intends the natural consequences of his acts." This should have been "of his wilful acts." It was for the prosecution to satisfy the jury that the gun was fired deliberately, and then the question of intent would arise. Many passages in the summing up lay down the law in a similar way, and finally the judge said: "As I have told you the law presumes that a man intends the natural consequences of his act, and to shoot a man at three or four yards has certainly the intent of maiming, or disabling, or preventing arrest. If you are satisfied that it was an accident, and that there was no intent to injure this man, you must acquit the prisoner, but if you are not satisfied of that, you ought to find him guilty of one or other of these charges."

Trevor Lloyd for the Crown. There was no misdirection, and on the whole summing up the jury cannot have been misled. In cases of homicide it is presumed to be murder until the contrary is proved, and there is no difference in principle because life is not actually taken. If a gun goes off in the act of resisting lawful apprehension, and a person is killed, it is manslaughter. Although appellant had been running away, when the gun went

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off he had turned round and faced the keeper, so he was then resisting apprehension. *Skeet*, 4 F. & F. 931 (1866), is in my favour.

Even if the gun went off accidentally the jury could have found a verdict of unlawful wounding on one of the counts of the indictment, and the Court therefore has power to alter the verdict to this.

CHANNELL J.: In this case we are all of opinion that the judge so directed the jury that he must almost certainly have been taken by them to lay down the law in a way which would not be correct. We cannot say how he came to do so. He said: "Of course any of us may discharge a gun by accident, and that would not be within the indictment, and therefore that is the whole question, but it is for the prisoner—not for the prosecution—to satisfy you that this happened accidentally." It may be that the criticism of counsel for appellant is correct and the judge was misled into drawing the wrong deduction from the maxim that the law presumes a man to intend the natural consequences of his acts, which can only mean of his conscious acts, not of his mistakes. A little later the judge said: "He ought not to be found guilty if he has satisfied you that he did not intend to do it." If that means "satisfies you that it is reasonably possible that he did not intend to do it," it would be correct, but it goes further. Then he points out that it was difficult for an accident to have occurred in the manner described, which was probably correct, and it was this, probably, that was in the judge's mind. Finally he said: "If you are satisfied that it was an accident, and that there was no intention to injure the man, you must acquit the prisoner." That would certainly lead the jury to think that the burden of proof was on appellant to satisfy them that it was an accident. The most that could be said was that the account of the prisoner was difficult to understand, and that if the jury did not accept it they could act on the evidence of the keeper. We feel that we must quash the conviction; if we had to go into the facts it was probably right, but it is not quite clear that an accident may not have happened, though not quite as the appellant suggests. It is possible that he raised the gun to threaten the keeper, not intending to fire, and that it then went off accidentally; but the

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conviction has to be set aside because the jury would have thought that the judge was laying down as the law something which is not the law.

Conviction quashed.

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WILLIAM MORETON.

How long a false pretence once made continues to operate, if goods are obtained, is a question for the jury.

This was an appeal against conviction by leave of Lush J. Appellant was convicted of obtaining goods by false pretences and credit by fraud, on the 10th February, 1913, at the Manchester City Sessions, before the Deputy Recorder, and was sentenced to fifteen months' imprisonment with hard labour.

The indictment contained counts charging the obtaining goods by false pretences under s. 88 of 24 & 25 Vict. c. 96, and alternative counts framed under s. 13 of the Debtors Act, 1869, 32 & 33 Vict. c. 62, for obtaining credit by false pretences or other fraud.

W. H. Aggs for appellant (under s. 10 of the Criminal Appeal Act), who was present. In this case the false pretences were alleged to have been made on the 26th November, 1912, when the appellant went to a Mrs. Finch and stated that he was working for one Nuttall; he was given board and lodging, and after being there for four days paid for the first week; after being there about ten days he left without paying for the last few days. I submit that there was not a sufficiently direct connection between the false pretences and the obtaining; see *Bryan*, 2 F. & F. 567 (1861), which was discussed in *Martin*, L. R. 1 C. C. R. 56; 36 L. J. M. C. 20; 15 L. T. 54; 15 W. R. 358; 10 Cox C. C. 383 (1867).

Secondly, the untrue statement made by appellant cannot have influenced Mrs. Finch; though not working for Nuttall he was working for a man named Davies, and it was the fact that he was in work, and not the particular employer, that induced Mrs. Finch to let him have the goods.

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Appellant was also convicted on another count for obtaining food from Mrs. Cooper, but the evidence does not bear out the conviction.

[CHANNELL J.: The jury found that the false pretences were made and acted on, so the Court cannot interfere. The real point is whether on this evidence the conviction ought not to have been merely for obtaining credit by fraud, for which he could not have received so severe a sentence—the maximum sentence under the Debtors Act, 1869, being one year's imprisonment with hard labour.]

Gardner, Dears. & B. 40; 25 L. J. M. C. 100; 7 Cox C. C. 136; 2 Jur. (N. S.) 598; 4 W. R. 526 (1856), is in favour of this view, and was followed in *Bryan*. These cases were discussed in *Martin*, but *Abbott*, 1 Den. C. C. 273; 2 C. & K. 630; 2 Cox C. C. 430 (1847), was not referred to there. The question is really whether there was a continuing false pretence, but the distinction between obtaining goods or credit is very narrow. In *Burton*, 16 Cox C. C. 62; 54 L. T. 765 (1886), Coleridge C.J. summarised what is necessary to constitute the offence, but the previous cases were not referred to in the judgment.

[CHANNELL J.: It must have been thought that *Martin* answered *Gardner*.]

If the goods were obtained by false pretences, but without an intention to defraud, a conviction could not stand. *Muirhead*, 1 Cr. App. R. 189; 73 J. P. 31; 25 T. L. R. 88; 53 S. J. 164 (1908).

Dehn for the Crown was not called upon.

LORD COLERIDGE J.: In this case an interesting point has arisen on the law of false pretences. Originally leave to appeal was given to argue this point, so we will not deal with the question whether false pretences were made. If it was open to argue the point it is quite clear that there was evidence on which the jury could find that there was a continuing false pretence until the time when appellant left the lodgings. The question has arisen

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whether on the facts of the case the conviction can be sustained, having regard to the diverse decisions in the past. It is clear that, if there is a false pretence made by the accused, and continuing at the time when the goods are supplied, that will operate as evidence that the goods were obtained by that false pretence. There are cases where the facts disclose that what was obtained by the false pretence was a contract, and that it was in pursuance of the contract that the goods were obtained; but on such facts a conviction for obtaining goods by false pretences was held to be good. *Kenrick,* Davison & M. 208; 5 Q. B. 49; 12 L. J. M. C. 135, Q. B. (1843). The case of *Gardner* has given rise to discussion: in that case the prisoner pretended to be a naval officer, and by reason of that false pretence obtained lodging; after he had been there some little time he entered into a contract with the prosecutrix to be supplied with meat and drink on specified terms. It was held that it was in pursuance of the contract, and not of the false pretence, that the goods were obtained; he was indicted for obtaining the goods by false pretences, and in the circumstances the Court held that there had been no continuing false pretence, and that the goods had been obtained, not by means of the original false pretence, but by means of the contract. The decision in *Kenrick* was followed in *Abbott,* in which case a strong Court of ten judges held that a false pretence knowingly made to obtain money is indictable, though the money be obtained by means of a contract which the prosecutor was induced to make by the false pretence of the prisoner; therefore the mere fact that the money was obtained by means of a contract does not seem to prevent the operation of law on the ground that the money was obtained equally by the false pretence as by the contract. *Gardner,* which followed *Abbott,* and cannot be said to overrule it, because two judges were parties to the two decisions, was clearly decided on the ground that there was no continuing false pretence, and therefore, although at first sight the two cases seem a little out of harmony, when the facts are looked at it is not so. *Bryan* came next, in which case Hill J., sitting alone at assizes, held that the facts of the case did not distinguish it from *Gardner.* Then came *Martin,* decided after all the cases to which I have alluded, in which Blackburn J. said, "I should have thought it was a question for the jury whether the food was supplied on the false pretence," a remark which, com-

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ing from that learned judge, carries great weight. *Martin* leaves the law in no doubt; it was held there that the fact that the goods are obtained under a contract does not make the goods so obtained goods not obtained by a false pretence, if the false pretence is a continuing one and operates on the mind of the person supplying the goods. Applying the law so laid down, it is evident here that there was evidence on which the jury could find a continuing false pretence operating on the mind of the person supplying the goods, and on these grounds the conviction must be upheld.

Appeal dismissed.

A. L. B. T.

BEFORE

MR. JUSTICE CHANNELL, MR. JUSTICE BRAY, MR. JUSTICE COLERIDGE, MR. JUSTICE BANKES AND MR. JUSTICE ROWLATT.

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MARKS LANDOW.

On an indictment charging an attempt to commit a crime it may be a misdirection not to distinguish an attempt in law from an intention or a threat.

This was an appeal against conviction and sentence, by leave of the full Court.

Appellant was convicted on the 7th February, 1913, at the Central Criminal Court, before the Recorder, of attempted procuration, and was sentenced to eighteen months' imprisonment with hard labour, twelve strokes with "the cat," and recommended for expulsion. The case was argued on the 11th March, 1913, when the Court thought that some of the points raised were fit to be argued before a fuller Court, and therefore ordered the whole case to be re-argued.

St. John Hutchinson for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was tried on an indictment containing two counts, the first of which charged him with having, on the 1st January, 1910, procured Rosa Landow, who was his wife, to leave her usual place of abode in the United Kingdom with intent that she should become an inmate of a brothel outside the King's Dominions. On this count the Recorder directed the jury to acquit the appellant, on the ground that there was no corroboration of the evidence of the prosecutrix. The second count charged him with attempting on the 6th January, 1913, to procure Rosa Landow to leave her usual place of abode with the same intent, and on this count he was found guilty. The wife's evidence was to the effect that the

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appellant met her while she was walking with her brother, and said, "What are you doing here?" She answered, "I came to see my parents." He said, "As I have not written you to come you had no business to come"; and she replied, "If I should have to wait until you wrote I should have to stay all my life there." He said, "You have got nothing to do here, we return both to Buenos Ayres"; and she said, "No, I am at my home and can do as I like," to which he replied, "You cannot do as you like, as I am your husband," and she answered, "You have got no right to order me, as I do not intend to keep you in the future as I have kept you up till now." He replied, "I have to decide, and you will have to go back to the same house where you were before," and attempted to hit her, but struck her brother instead on the shoulder. The brother gave evidence in corroboration of this conversation. A police officer who had been detailed to watch the appellant also gave evidence, but as the conversation was in Yiddish he could not speak as to that.

My first ground of appeal is that there was no corroboration of the evidence of Rosa Landow in some material particular by evidence implicating the accused as is required by statute. This evidence only shewed that the appellant ordered his wife to return to her business in Buenos Ayres; she stated that she had spent three years in brothels there, and sent her earnings to him, but there was no corroboration of this, and without this there was no evidence of any offence having been committed; the business to which he wanted her to return might have been perfectly legitimate.

[BRAY J.: Are you not insisting on corroboration on every material part? Is it required on both points, the attempt and the intention?]

Unless the intent is corroborated, there was no evidence of an offence at all. See *Farler*, 8 C. & P. 106 (1837). It is true that in that case Lord Abinger left the case to the jury, but advised them to acquit on the ground that the corroboration was not sufficient, but in the present case the question was not dealt with in the summing up at all.

[BRAY J.: Mr. Purcell, who defended appellant at the trial.

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said in terms that there was some corroboration on the second count, and that may explain why it was not dealt with in the summing up.]

Even then it was the duty of the judge to direct the jury on the point. If corroboration of the intention is not required in such a case it opens the door to blackmail and revenge by an unscrupulous woman. *Everest*, 2 Crim. App. R. 130; 73 J. P. 269 (1909), is in my favour.

[BRAY J.: The Lord Chief Justice said in *Blatherwick*, 6 Crim. App. R. 281 (1911), that that case goes too far.]

When the charge was read over to appellant he did not dispute it, but said, "I quite understand. She had no business to come back here," but it would be straining the remark too far against him to consider it as corroboration. The Recorder directed the jury that counsel for the defence did not dispute the life Mrs. Landow was said to have lived in Buenos Ayres; if he was suggesting that admissions by counsel could be corroboration it was a clear misdirection, though I admit that it might have been sufficient if appellant himself had clearly admitted the fact.

My second submission is that there was no evidence at all of an attempt in this case, or, if there was any, the jury were never directed what constitutes an attempt in law. In *William Taylor*, 1 F. & F. 511 (1859), Pollock C.B. directed the jury: "The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution." Although this direction has been doubted in another case, it has never been overruled. In the Draft Criminal Code, prepared in 1878 by Lord Blackburn and Barry, Lush and Stephen JJ., the following definition appears (s. 74): "An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause"; and this definition was adopted in *Laitwood*, 4 Cr. App. R. 248 (1910). The mere intention to commit a misdemeanour is not criminal; some act is required, and it has been

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held that acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it; *Eagleton*, 6 Cox C. C. 559; Dears. C. C. 515; 24 L. J. M. C. 158; 3 C. L. R. 1145; 1 Jur. (N. S.) 940; 4 W. R. 17 (1855). Here the words used were merely a threat, and an idle threat, but the difference between attempt and intention was never pointed out to the jury, although it is a question that they would be very likely to misunderstand.

The sentence was too severe, and from the observations addressed to appellant by the Recorder in passing sentence, it is obvious that he was influenced by the suggestion that he had kept his wife in a brothel for three years, on which charge he had been acquitted. Further, the Legislature intended flogging to be imposed only in very bad cases. As this woman had been a prostitute for three years this was not a fitting case for corporal punishment.

Travers Humphreys (with him *R. Oliver*) for the Crown. On the question of corroboration, I submit that it was not required beyond the evidence of Mrs. Landow's brother. If corroboration is required both as to the attempt and the intention, it would be unnecessary to call the woman at all. Regard must be had to the facts, and the defence raised in this particular case; the prosecution asked the jury to draw the inference that appellant meant his wife to go into a brothel, and it was open to the jury to consider the conduct of the defence in deciding whether they would draw this inference; questions were asked of the woman in cross-examination as to her life in the brothel in Buenos Ayres, which could only have been suggested by appellant, and Mr. Purcell gave as his reasons for not calling appellant that he had been living on his wife's immoral earnings, and that therefore no one would believe him on oath. But if further corroboration was required there was evidence on three points which supplied it. Drafts were produced which shewed that the woman had sent appellant £25 in two months; there was a postcard addressed by appellant to her in her maiden name, and there was the statement made by him on arrest. In *Cohen*, 3 Crim. App. R. 234; 73 J. P. 352 (1909), there was far less corroboration than here, but it was held to be sufficient.

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[BRAY J.: *Kams*, 4 Crim. App. R. 8 (1910), is a strong case in your favour.]

It must be admitted that no definition of "attempt" was given to the jury in the summing up, but had the Recorder done so it would only have been to tell them that there was ample evidence on which they could find an attempt. The evidence was put to the jury, and if the evidence was fairly capable of proving an attempt that is sufficient. "You will have to go back to the same house where you were before" are words capable of only one reasonable construction, and the fact of the assault shews that appellant was trying to enforce his will. The jury were asked by counsel for the defence whether the words were not a mere threat, and it is reasonably clear that, if the Recorder had directed them on the point, they would have come to the same conclusion, so there has been no miscarriage of justice.

As to sentence, under both Criminal Law Amendment Acts, 1885 and 1912, dealing with this offence, the punishment may be the same for the offence and the attempt.

Hutchinson. The drafts of money were no corroboration, as they might have been earned in any way; nor was the postcard, which was couched in affectionate terms.

CHANNELL J.: In this case several rather interesting questions have been argued; the consideration of them has been somewhat complicated by the way in which the trial was conducted. It was admitted by counsel for appellant that there was corroboration on the second count, and this may be the reason why the question was not more fully dealt with in the summing up. It is obviously not desirable to lay down the law on a point that is not necessary to the decision in the case. On one point we are all agreed; it is on the question of an attempt. Although there was evidence which the jury might have found amounted to an attempt, there was no evidence on which it was necessary that they should take that view; therefore it was a case where it was particularly necessary for the Recorder to explain that which we think an ordinary jury of laymen would not easily understand, the difference between an attempt, a mere intention, and an idle threat. We think that the Recorder did not in fact sufficiently explain this

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difference to the jury. He was probably misled by the way in which the case was conducted, so we are not surprised that the necessity for giving an explanation of what constitutes an attempt seems to have escaped his notice. In our view he should have given the explanation that there must have been an effort on the part of the appellant to make his wife go to a brothel in Buenos Ayres. If it was possible for the jury to construe what took place as a mere desire that she should go, or an intention to make her do so at some future time, it was open to them to acquit the appellant. We think that the point was not sufficiently explained to them. There was no miscarriage of justice if the case was one in which the jury could only find one way. We agree that it is probable that they would have found the same way, but it is not necessary that they should have done so, and therefore the appeal must be allowed.

Conviction quashed.

Solicitors for the Crown—*Wontner & Sons.*

A. L. B. T.

BEFORE

MR. JUSTICE CHANNELL, MR. JUSTICE BRAY, AND MR. JUSTICE COLERIDGE.

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EDWARD BUCKTON CARGILL.

The evidence of a female witness as to her chastity, admitted though irrelevant to the issue, cannot be rebutted by positive testimony because she has maintained her statement when cross-examined to credit.

In determining sentence it is proper to consider, on the one hand, the social position of the offender, and on the other that the offence may be aggravated by reason of such position.

This was an appeal against conviction on points of law, and an application for leave to appeal against conviction on fact and against sentence. Appellant was, on the 27th February, 1913, at the York Assizes, before Rowlatt J., convicted of having had carnal knowledge of a girl under the age of sixteen and above that of thirteen, and was sentenced to nine months' imprisonment with hard labour.

Sir Edward Carson, K.C. (with him *Kemp, K.C.* and *Cautley*) for the appellant, who was not present. The appellant was a prominent citizen of Hull, who has had to resign many appointments in consequence of this conviction. On the 26th September, 1912, he was walking in Hull to his club when he met three girls, Forsey, De Forges and Woodbridge; he admitted having had connection with De Forges on a previous occasion. They asked him to give them some refreshment, and they went to two tea-houses, the appellant walking on one side of the street, and the girls on the other; one of these houses was closed, and the other full; one of the girls then suggested that they should go "down yonder," meaning an accommodation house which appellant had visited with De Forges. While there appellant was said to have committed some

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indecency with Woodbridge, who left shortly afterwards; whiskey and port was sent for and consumed by them all, and then it was alleged that appellant lifted Forsey on to a bed and had connection with her, she being fifteen, in the presence of De Forges. Appellant stated he only went to the house to give the girls refreshment.

In opening the case for the prosecution, Mr. Tindal Atkinson stated that the girl had been a virgin and had been seduced by appellant, and Forsey stated in examination in chief that she had never had connection with anyone before. Mr. Kemp, who defended, cross-examined the girl as to whether she had not been a prostitute for two years; he put specific cases to her, and various men were called into Court with whom it was suggested she had had connection, but she denied it all. Appellant gave evidence admitting having been at the house, but denying that any misconduct had occurred between him and any of the girls. Then Mr. Kemp tendered evidence to shew (1) that Forsey had not been virtuous up to the day in question; (2) that none of the girls were of such a character as that they could be believed. The judge said that whether Forsey had been a virgin up to that date was not an issue in the case at all, and he would only ask the jury whether appellant had had connection with a girl under sixteen years of age, and he excluded the evidence.

This exclusion of the evidence was, I submit, wrong, and the appellant was entitled to give evidence that the status of the prosecutrix, as alleged by the prosecution, was untrue. If a man dressed as a clergyman gave evidence in a case and was cross-examined as to whether he was not a waiter at a public-house who had been dressed up for the purposes of the case, evidence to prove that such was the case would, I submit, be admissible. It is true that when a witness is cross-examined to credit his answers must be taken as conclusive, but this case is different, as it was not merely the credit but the status of the witness that was in dispute. It is also true that Mr. Kemp might have objected to the question put in examination-in-chief whether Forsey had had connection with anyone before, but it was then too late; the matter had been opened and appellant's case considerably prejudiced. In *The Attorney-General* v. *Hitchcock*, 1 Ex. Rep. at 99; 16 L. J. Ex. 259; 11 Jur. 478 (1847), Pollock C.B. said: "I have always understood—and it is a matter on which I am not now

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expressing an opinion the result merely of the argument and consideration of to-day, and of the other day when the matter was before the Court, but the result of much consideration given to such questions during great experience in such matters, and with questions respecting the law of evidence—my view, I say, has always been, that the test whether the matter is collateral or not, is this: if the answer of a witness is a matter you would be allowed on your part to prove in evidence—if it have such a connection with the issue that you would be allowed to give it in evidence—then it is a matter on which you may contradict him."

[CHANNELL J.: That means allowed even if objected to.]

As the Crown gave evidence on the subject they cannot be heard to say that the matter is merely collateral. In *Thomas* v. *David*, 7 Car. & P. 350 (1836), evidence having a bearing on the general status of the witness was held admissible. There are cases where the giving of evidence on one side lets in evidence on the other side which would not otherwise have been relevant: *Bamfield* v. *Massey*, 1 Camp. 460 (1808).

[LORD COLERIDGE J.: All that case lays down is that you may contradict relevant evidence.]

But evidence must be relevant if it is introduced by the prosecution, admitted by the Court, and is most prejudicial to the accused. A grave injustice is done to the appellant by the exclusion of this evidence after the minds of the jury had been prejudiced against him by the suggestion that he had seduced the girl.

Secondly, I submit that the evidence was admissible as being material to the issue on the question whether appellant had reasonable ground for believing the girl to be over sixteen years of age. It is true that he had not seen her before, but the nature of the life we allege she had led would have had an effect on her appearance and demeanour, and so would have affected opinion as to her age.

De Forges in her evidence admitted that she was a prostitute, but said it was the appellant who had made her one; she was then cross-examined as to particular men and particular occasions.

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I admit that in this case the defence was bound by her answer, but the evidence was admissible on the question whether she was a person who could be believed even on oath. See *Brown*, L. R. 1 C. C. R. 70; 36 L. J. M. C. 59; 16 L. T. 364; 15 W. R. 795; 10 Cox C. C. 453 (1867).

The jury returned into Court after nearly an hour's absence and stated that they were unable to agree; the judge then gave them a further direction on the question of reasonable belief as to the girl's age, and added: "You will remember it is suggested he was always going about with little girls as he did with De Forges, and that he did not consider age at all." There was no ground for this suggestion; the only girl he had been with was De Forges, who admitted having told him that she was eighteen. The judge ought never to have made this statement, which was highly prejudicial to appellant and which was supported by no evidence. After that the jury found appellant guilty but with a strong recommendation to mercy, and on these grounds I ask that the conviction should be quashed.

The sentence was excessive, and the fact that by the conviction appellant loses everything he has in the world ought to have been taken into consideration by the judge.

Tindal Atkinson, K.C. and *G. F. Mortimer* for the Crown were not called upon.

CHANNELL J.: Since the adjournment we have had an opportunity of considering this case, and we are all of the opinion that there is no ground for allowing the appeal. The main point, and the only substantial point raised, is the question of rejection of evidence. Sir Edward Carson does not contest the general rule that matters which go to credit only, and are relevant only as going to credit, cannot be contradicted by further evidence. Beyond all doubt that is the general rule, and the judge who tried the case acted on it and applied it. It is suggested, however, that there is some exception to the rule; no doubt there are cases which are not quite easy to reconcile with it; there is no indication in any of these cases that the judges intended to make an exception to the rule, but it appears that for some reason which is not very clear from the reports, that the Court thought in each case the evidence had a bearing beyond the more question

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of credibility. Sir Edward Carson suggested that there is an exception when the matter goes to the "status" of the witness; for myself I could not understand the meaning of this, and I am not sure that Sir Edward Carson did, as he failed to make the point clear. When one comes to try to trace it the only place in which the word is mentioned in connection with this matter is in *The Attorney-General* v. *Hitchcock*, 1 Ex. R., at p. 103, in the judgment of Alderson B. The first observation that I desire to make is that in that case the evidence was rejected, so anything that was said could be but a *dictum*, as it was a case in which the general rule applied. Alderson B., referring to one of the cases, *Thomas* v. *David*, where the question arose, which gave rise to the greatest difficulty, said: "So in the case before my brother Coleridge, in which the woman who was called as a witness for the plaintiff was asked whether she was not living with the plaintiff as his mistress. The tendency of the question was to shew that she stood in that peculiar relation to the plaintiff which the jury ought to know in order that they might judge to what extent they could rely on the general character of her testimony as an impartial witness between the plaintiff and the defendant. The question had a bearing on the general status of the witness." It is not easy to understand what that means, but at that time, in 1847, the law of evidence had been recently altered, and judges had in mind generally the question of the competence of a witness, and it looks as if in that judgment "status" might well refer to competence. There is no indication in any case of any intention to introduce an exception to the rule, but merely an intention to bring the facts of the particular case within the rule.

The next point taken is, that the evidence was admissible to contradict the evidence that the girl was a virgin because counsel for the prosecution had mentioned her chastity in his opening, and had asked her a question in examination-in-chief to prove that the appellant had seduced her. We all think that this question was not admissible, not being relevant to the issue, and it might have been objected to. It ought not to have been mentioned, but it is very common for counsel to state matters which, though not actually relevant to the issue, go to aggravation of the punishment. It is generally good policy for counsel for the defence not to object, but to get a grievance. It may be that Mr. Kemp thought that

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this gave him an opportunity of calling all his witnesses, but it cannot be because the prosecution introduce an irrelevant matter that it entitles counsel for the defence to ride off on it, and so in every way to complicate the issues of the case.

Another point urged in favour of admitting the evidence is that it was material on the question of the girl's apparent age. It might have been, but when the prisoner said he only met the girl for the first time a day or two before, it cannot be a reasonable ground for his believing that she was over sixteen. We agree that a man who knew that she had been a prostitute for two years might have ground for believing that she was over sixteen.

Those are all the matters that go to the question of the admissibility of this evidence. It is said an injustice has been done. I think that the ordinary rules of evidence do sometimes do an injustice. The rules are made to meet the general run of cases, and it cannot be helped if in particular cases they work an injustice. It is better to apply the rules strictly than to allow it to be supposed that a judge has discretion to relax them if he thinks they will work an injustice. Here the answer is that practically no injustice was done, and we cannot conceive anyone thinking that an injustice was done. No one can doubt that the jury were satisfied that the girl was lying as to her past life. We hope Mr. Kemp will forgive us if we say that he may have been riding for a fall; it was much better for him that the evidence should be rejected. We have not the advantage of a shorthand note of counsel's speeches, but we are confident that he began with a scathing criticism of Mr. Tindal Atkinson's conduct, and enlarged on the grievance of the exclusion of the evidence. He then, no doubt, pointed out that the girl's story was most improbable in every way; if she was not a prostitute already she was most anxious to become one. Her story is very difficult to accept, but there is no doubt that the jury, after her cross-examination, were satisfied that the girl was of bad character, and therefore we do not think that appellant suffered the least injustice. We think that the way in which the jury dealt with the matter shews this; they hesitated for a long time, then, when the judge gave them an explanation on the question of age, they soon agreed. That indicates that before that they thought that the girl was not to be believed on the question of her chastity, and that therefore it was difficult to accept her evidence on the question of her age.

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Down to that time the judge had not pointed out that they might act on their own opinion as to her age, but when they came back he said what most judges say to juries, that evidence of conversations as to age are generally unsatisfactory; he said: "As you have come back I ought to say this to you. I did not say much about the question of age. What the statute says is that it is a defence if a prisoner has reasonable ground for thinking a girl is over sixteen years of age. Now you will remember that there was evidence given by the girl that she said she was under sixteen —fifteen—and there was evidence given by the prisoner that she said she was eighteen. Well, you may believe one or the other, but I ought to tell you that a conversation of that kind is not conclusive, and a man cannot go about asking girls the question, and, simply because they say they are over sixteen do what he likes with them. You must look at the girl, look at the evidence, look at everything, and if it appears to you that the prisoner had reasonable grounds for believing she was over sixteen, and that he did the act, of course you will find him not guilty and acquit him." That really is the question which the jury ought to consider, and not puzzle themselves over what the man was told. If the jury think that no man could reasonably think the girl was over sixteen, they ought to convict whatever the evidence is.

A complaint has been made that the judge did not draw the attention of the jury to the suggestion that was made that the girl may at the time have looked older, and was dressed at the trial in a juvenile manner so as to deceive. This would have been mentioned by counsel in his speech, and in forming their opinion the jury ought not to ignore the suggestion, though it is not necessarily in the interests of a young prostitute to make herself look older than she is. There was some suggestion that young girls were somewhat successful in this unfortunate trade. It is impossible to interfere with the conviction because the judge did not point out that four months before the girl may have looked older than she did then.

The last point raised is the remark of the judge to the jury: "You will remember it is suggested that he was always going about with little girls as he did with De Forges, and that he did not consider age at all." We have not seen De Forges, but she was sworn to as being a little girl. It certainly had been suggested, because in her own evidence the girl Forsey had said he

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had asked her if she could get a girl of fourteen. The judge did not say it was true, and if the jury thought it a mischievous suggestion they were quite capable of rejecting it.

I have gone through all the objections raised in this case. It only remains to say that we have all read the whole of the shorthand note, and we cannot doubt the justice of the conviction.

There remains the question of sentence. An appeal has been made to us because of the serious consequences which a conviction has to a man in this position. Punishment is sometimes imposed for the sake of others. This case revealed a very unfortunate state of things at Hull; the place was infested with a plague of very juvenile prostitutes. That being so, and a clear case found of a man assisting in that state of things, and breaking the law, it was necessary to inflict a substantial punishment. In addition to this it is very desirable, if possible, to pass a sentence on a man in a good position exactly the same as on a man in a different position; it is true the sentence is harder, but the offence is correspondingly greater; the man ought to know better, and the way of meeting that is to give exactly the same sentence; the sentence is worse, but, by reason of the prisoner's position, the offence is worse. Even if the Court thought it would have only imposed a sentence of six months', instead of nine months', imprisonment, it does not interfere with sentences on that ground alone.

Appeal dismissed.

Solicitors for Appellant—*C. J. Smith & Hudson* for *A. M. Jackson & Co.*, Hull.

Solicitor for the Crown—*G. S. Williamson*, Hull.

A. L. B. T.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE PICKFORD, AND MR. JUSTICE AVORY.

WALTER SYKES.

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Murder—A confession properly proved in law needs no corroboration to found a conviction, although in practice there is invariably some corroboration.
The doctrine of "reasonable doubt" may be conveyed to the jury in any adequate language.

This was an application for leave to appeal against conviction. Appellant was convicted of wilful murder, at the Leeds Assizes, before Mr. Commissioner Foote, K.C., on the 10th March, 1913, and was sentenced to death.

L. G. Hoare for the appellant (under s. 10 of the Criminal Appeal Act), who was present. On the 15th November, 1912, a girl aged eleven years and named Amy Nicholson was murdered; another girl, Frances Alice Nicholson, was also murdered at the same time, but the trial was only in respect of the death of Amy. No suspicion would have fallen on appellant unless he had on the 29th December made a statement to one Vesey Haigh to the effect that he was the murderer; Haigh informed the police, and appellant was taken to the police station, where he made a further confession to Inspector Barraclough. These confessions appellant subsequently retracted. The evidence for the Crown consisted of these confessions and certain circumstantial evidence. No point of law arises in the case, but I submit that the Commissioner misstated the facts to the jury in such a way as to amount to a misdirection. He began by saying, "The sort of certainty which is expected from

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you before you find a verdict of murder is just the same sort of certainty which you would follow in all the important matters of life. If you were to go now and say, 'Of course, he killed the child; I know it, but I did not like to find him guilty on that evidence,' if you were to go home and say that of course he did it, I know it, then you ought to convict him. I know no more practical test than this: would a man say, speaking honestly and without fear of the consequences, I am sure he did it? That is certainty."

[RIDLEY J.: He recurs to the subject at the end of his summing up in language which is unexceptionable.]

Further on he said: "We had before us a perfectly respectable woman, Mrs. Copeland, who swears that he did sleep out that night, and not only does she swear that he did, but he told her that he had next morning." This was true, but the prosecution are there relying on the statements of a man whom on another subject, his retractations, they said was unworthy of credit, so the jury ought to have been warned not to attach too much importance to this statement by the appellant.

According to the evidence of Inspector Barraclough, about an hour after confessing to him appellant said: "What I have already told you is untrue"; before the magistrates the Inspector had used the word "incorrect," which might mean not absolutely accurate, instead of the word "untrue," but the Commissioner asked the jury whether this remark meant more than incorrect in some detail. The evidence given by the Inspector before the magistrates ought not to have been referred to.

It was suggested by the Crown that appellant had seen the police taking impressions of trousers which were found on the earth at the scene of the murder, and that it was in consequence of this that he had the patches in his trousers altered, but the evidence of Mrs. Binder and Miss Binder was to the effect that while the appellant was watching all the police were doing was moving the bodies into an ambulance; nevertheless, the Commissioner represented them as saying definitely that he saw the police taking the impressions.

There was clear evidence that at some time before her death the girl had been violated, but the doctor expressed the opinion

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that it did not occur on that particular occasion. There are passages in the summing up pointing to the association of the appellant and the girl being based on immorality; this had nothing to do with the case as it stood against the appellant on the evidence, but was apt to raise a feeling of prejudice against him.

The main evidence against the appellant was his own statements; the confession to Haigh was made in language of great obscenity and is quite unreliable; the next statement was made in the cells and was signed by him, and must carry considerable weight; then he gave information as to where his trousers and knife were hidden; then he made further statements retracting his confessions, and in one of them saying that a man named Gedney could prove an *alibi*. He also said: "If I had built my castles and had not given myself away they would never have found me out," but this and other similar remarks only meant that but for his statement to Haigh he would still be at liberty, which was the case whether that statement was true or false. The result is that the statements and evidence of the appellant were practically worthless as proving either his guilt or his innocence, and as the remaining evidence was consistent either with his guilt or innocence, the Commissioner ought to have told the jury that the prosecution was asking them to convict on the statements of a man whose evidence they were themselves characterising as worthless.

Lowenthal and *W. Jardine* for the Crown were not called upon.

RIDLEY J.: In this case Mr. Hoare has put very ably all the points that can be urged in favour of the appeal. It is another of the cases where counsel, endeavouring to do all that is possible for his client, attacks the summing up and suggests that there has been misdirection. I think that the term is loosely used, for comment on facts properly stated to the jury is not misdirection. Here we have heard all that can be said and read the shorthand notes of the case, and it is not possible to say that the summing up contained any misdirection. The case is undoubtedly peculiar, and requires consideration because it consists of two

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halves, neither of which would be sufficient alone to justify a conviction. It would have been unsatisfactory to convict on the evidence had it not been assisted by the confession, and probably it would have been unsatisfactory if the conviction rested on the confessions only, without the circumstances which make it probable that the confessions were true. The answer to Mr. Hoare's argument is that all the matters were fairly put by the Commissioner.

The first point taken is that the Commissioner did not properly express the sort of certainty required on the part of the jury to convict. He used words which are not those commonly used, but are not erroneous; his first sentence was, perhaps, not sufficient, but it cannot be taken alone. It does not contain the general and explicit direction as to reasonable doubt, but at the end he deals with the question of reasonable doubt, and gives a complete and accurate direction as to the amount of certainty required.

Then a point is taken as to Mrs. Copeland's evidence, and it is suggested that the facts were not properly put to the jury; we cannot find any such fault. There was evidence that the appellant had slept out on the night in question, and had told both Gedney and the constable so. Then we come to the statements made to Barraclough and the other witnesses; we cannot see anything wrong in the question whether the appellant said "untrue" or "incorrect." In his summing up the Commissioner dealt with the point and made a suggestion against the prisoner, but this was not incorrect on the principle which I have stated.

The main point, however, is one independent of all these details, the question how far the jury could rely on these confessions. I think the Commissioner put it correctly; he said: "A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive, and is properly proved, a jury may, if they think fit, convict him of any crime upon it. But seldom, if ever, the necessity arises, because confessions can always be tested and examined, first by the police, and then by you and us in Court, and the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? is it corroborated? are the statements made in it of fact so far as we can test them true? was the prisoner a man who had the opportunity of com-

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mitting the murder? is his confession possible? is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?" It was said that the murder was the talk of the countryside, and it might well be that a man under the influence of insanity or a morbid desire for notoriety would accuse himself of such a crime. I agree that this is so, but it was a question for the jury, and they ought to see whether it was properly corroborated by facts, and so they were directed. We think that this part of the case was quite sufficiently left to the jury, and the Court thinks that there is no reason for giving leave to appeal.

Application dismissed.

A. L. B. T.

GEORGE CHARLES GORDON, HENRY HICKSON, HENRY WILLIS AND DANIEL HARRIS.

In a proper case the Court will adjourn the hearing of an application and permit the name of a prospective witness not to be mentioned in public if it is duly supplied to the registrar.

These were applications for leave to appeal against convictions for robbery with violence and to call further evidence. Appellants were convicted on the 14th of February, 1913, at the Central Criminal Court, before Avory J.; Gordon and Harris were sentenced to seven years' penal servitude. Hickson and Willis were also convicted of being habitual criminals, and were sentenced to five years' penal servitude and five years' preventive detention.

Schultess Young (with him *Fox Davies*) for the appellants, who were not present. I ask that this application should be adjourned for a week. The brief was only delivered on Saturday, and I am not yet in a position to argue the application. The main point in it is that matters have arisen since the trial as to which I desire to call further evidence. On Saturday the

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solicitor instructing me had an interview with this witness, who is now in prison awaiting his trial, which will take place this week; he will say that he was a principal in the crime for which appellants have been convicted, with four other men, who were not any of the appellants. I am unable to mention the name of this witness, as he feared it would prejudice his trial if it were known, and, therefore, the solicitor gave him an undertaking that it should not be stated in Court.

RIDLEY J.: The Court grants an adjournment for a week, but the name of the witness must be given to the Registrar on the usual form at once. (See p. 246.)

Application adjourned.

Solicitors for the Appellants—*Engell & Crane.*

A. L. B. T.

SYDNEY STUBBS.

Severity of sentence.
The criminality of negligence leading to manslaughter may be mitigated by the negligence of the deceased.

This was an appeal against sentence by leave of the full Court. Appellant was convicted of manslaughter, at the Manchester Assizes, on the 21st February, 1913, before Bailhache J., and was sentenced to three years' penal servitude.

Tobin, K.C. (with him *J. C. Jackson*), for the appellant, who was present. The appellant was a motor-engineer at Winsford in Cheshire. He was driving a motor-car in Oxford Road, a busy thoroughfare in Manchester, on January 6th, 1913, at 5.45 p.m.; it was a dark, windy evening, and as it was drizzling the granite setts were greasy, so it was not easy to drive at the time. There is a double set of tram-lines in the road, the distance between the curb and the nearest tram-line being 17 feet 3 inches. Appellant had driven the car for half a mile along the road without mishap, and was overtaking and

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preparing to pass on the near and proper side a tram-car which was going in the same direction as himself. A woman left the pavement on his near side and walked to within a pace of the tram, when the conductor signalled that it was full. She stood there until the motor-car was within two yards of her, when, without looking back, she suddenly ran across the road and was hit by the off head-lamp of the car and killed. I accept the finding of the jury that the appellant was criminally negligent, but as they took fifty-five minutes to decide this point, which was the only question in the case, the negligence cannot be said to have been very gross or obvious. (He was stopped by the Court.)

Wingate-Saul for the Crown. I am only instructed to see that all the facts are before the Court. Although the night was dark appellant admitted that he saw the woman when she was 50 or 60 yards off. He was sober at 4.30 p.m., but after the accident two doctors and two police officers said that he was under the influence of drink; there were two men with appellant between 4.30 and 5.45 who could have spoken as to his conduct during that time, but although they were in Court they were not called on behalf of the appellant.

[AVORY J.: The appellant drove the dead woman to the infirmary through a difficult entrance, and a police officer then trusted him to drive him to the police station.]

It was proved that when the car was going at 20 miles an hour it could be pulled up in 20 yards, but it travelled 46 yards after striking the woman before being stopped; the appellant's explanation of this was that he put on the hand brake, but that the car skidded, so he released it. The only two witnesses for the prosecution who were cross-examined on this point, denied seeing the car skid or its pace checked. There were previous convictions against appellant for offences under the Motor Car Act, 1903, and though these were not mentioned in Court they appeared in the judge's calendar.

[AVORY J.: That is not evidence against him; the calendar is sometimes wrong.]

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RIDLEY J.: In this case the appellant was convicted of manslaughter, his negligence in driving a motor-car having caused the death of a woman. We are all of opinion that the conviction was a proper one, but that question is not now before the Court. It was, in a way, a bad case, but it was not the worst case that can be imagined. The thoroughfare was crowded, there was a good deal of traffic, the road was traversed by tram-cars and rails, and there were stopping places at which people were waiting. Appellant was driving at a pace which was reckoned by himself to have been from twelve to fifteen miles an hour, and by one witness at rather more. I think that that was negligent. There was also a suspicion that he was under the influence of drink, though the case is not a strong one on that point, as he was able to steer the car to the infirmary and to drive the constable to the police station. If one allows that the woman was partly guilty of negligence her conduct alleviates that of the appellant; still, he was guilty of taking the risk of running over her if she made the slightest attempt to run back to the pavement. These things must not be allowed to occur, and people who cause the death of a pedestrian in this way must be punished; but we do not think it a case for penal servitude. We must therefore bring our own judgment to bear on the question of what is the proper sentence, and we think it should be one of twelve months' imprisonment with hard labour to run from date of conviction.

Sentence reduced.

Solicitors for the Appellant—*R. B. Wheatley, Son & Daniel* for *Cobbett, Wheeler & Cobbett,* Manchester.

A. L. B. T.

GEORGE FOWLER.

Habitual criminal—Inadmissible evidence of convictions and other charges or other irregularities at the trial which may influence the verdict, are not within the proviso to s. 4 (1) of the Criminal Appeal Act, as they may lead to a "substantial miscarriage of justice."

This was an appeal against sentence and an application for leave to appeal against conviction as a habitual criminal. Appel-

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lant pleaded guilty to larceny, obtaining money by false pretences, and forgery, and was convicted of being a habitual criminal, at the Leeds Assizes, on the 6th March, 1913, before Mr. Commissioner Foote, K.C., and was sentenced to five years' penal servitude and five years' preventive detention.

V. B. Mockett for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The application for leave to appeal in this case was drafted by the appellant, and I desire to allege misdirection. The notice to the appellant under the Prevention of Crime Act, 1908, contained the following grounds in addition to the three statutory convictions:—"(2) That having been discharged from custody on the 14th May, 1912, you obtained employment in that month at the Hamstead Colliery, at West Bromwich, which you left of your own accord on the 18th July, 1912. (3) That on the 19th July, 1912, you absconded from West Bromwich after stealing two war medals, the property of Albert Marshall, and that for this offence a warrant, which has not been executed, was issued at West Bromwich for your arrest. (4) That at the date of your latest arrest, which was on the 15th January, 1913, you were under the supervision of the police and under an obligation to report yourself to the police once in every month, and that you failed to fulfil this obligation between the 1st July, 1912, and the 15th January, 1913."

Evidence was given of other matters not covered by this notice, including charges of having taken lodgings and disappearing without paying for them. The only evidence of this and of the theft of medals was hearsay, a policeman stating that he had received information on the subject, and also that the appellant was heard of at Nuneaton, where he had the stolen medals in his possession. The warrant on this charge was never executed, and he must be presumed to be innocent of it until he is proved guilty. The only other possible evidence on the point is an alleged request to have this case taken into consideration in passing sentence, which was denied by appellant. Failure to report to the police is not of itself sufficient to support a charge of habitually leading a dishonest or criminal life. *Mitchell*, 7 Cr. App. R. 283; 76 J. P. 423; 28 T. L. R. 484 (1912). There was evidence that the appellant worked between July and August, and again between the 28th August and the 25th

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October; after that date there was no evidence at all as to his movements until his arrest. A detective said in evidence that he was suspected of crimes at Halifax and West Bromwich; there was nothing in the notice to justify this evidence.

The Commissioner, in his summing up, said that the appellant had been in gaol at Nuneaton; there does not seem to be any foundation in the evidence for this statement. He also referred to the charges at Halifax and West Bromwich, and, lastly, made various remarks which suggested that the *onus* was on the appellant of accounting for his time between the 5th October and the 6th December; he said: "There is a gap of two months there which he does not account for."

Comyns Carr for the Crown. I must admit that serious irregularities occurred in the course of this trial, especially as regards the admission of evidence which was not justified by the notice, and I must fall back on the proviso to s. 4 (1) of the Criminal Appeal Act and submit that there has been no substantial miscarriage of justice. He had pleaded guilty in the hearing of the jury to larceny, forgery, and obtaining money by false pretences, and there was the evidence as to the theft of medals at West Bromwich; the jury might take the view that while he worked honestly when he could get work, when he could not he reverted to crime, as in *Martin*, 7 Cr. App. R. 227 (1912). *Heard*, 7 Cr. App. R. 80; 106 L. T. 304; 76 J. P. 232; 22 Cox C. C. 725; 28 T. L. R. 154 (1911), is also in my favour. The reference to his having been in gaol at Nuneaton must have been a mistake on the part of the Commissioner, but it is to be noticed that the appellant at the trial said he had never been there, while at another point he said something happened before he went to Nuneaton. Assuming everything in his favour as to the interval unaccounted for, the jury might still have found him guilty, and therefore the conviction should stand.

PICKFORD J.: This appellant was convicted of being a habitual criminal; he certainly had a bad record; there were a number of convictions against him, and he pleaded guilty to three indictments alleging larceny, forgery, and obtaining money by false pretences. He pleaded not guilty to being a habitual criminal,

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and was tried and convicted on that count. The grounds given in the statutory notice were as follows (his Lordship read the notice quoted above). An important question arises for the consideration of the Court on these grounds, namely, whether any notice was given to the appellant of two important matters which were alleged against him: (1) a charge of having committed a felony at Nuneaton; (2) of having committed a felony at Halifax. It is clear that there was no notice of these charges; counsel for the Crown admits this, and can only get over the difficulty on the strength of the proviso by suggesting that there has been no substantial miscarriage of justice. The Commissioner characterised it as a difficult case, and did not seem to think it at all a clear case, and for this reason. The appellant was discharged from prison in May, 1912, and it is admitted that he did honest work at the Hamstead Colliery until July. There is information that he worked at other places after this. In these circumstances, and in view of the fact that there was an interval of several months between his release from prison and his arrest in January, 1913, it was important to know what he was doing besides this work, and the fact that the jury heard that there were three charges against him in the interval was of great importance. As to one of these charges there was evidence, but as to the other two the evidence was inadmissible. It seems to the Court that it cannot be said that the jury would certainly or most probably have convicted the appellant if there had only been evidence of one charge instead of three. It is impossible to say that the admission of the evidence of these two other charges did not seriously affect the conclusion at which the jury arrived, and so it does not appear to the Court that it is a case where effect should be given to the proviso. That is not the only point; there are other matters which it is difficult to explain. There is the statement by the Commissioner that during the interval the appellant had been in gaol; there was no evidence of this, so in the opinion of the Court the conviction as a habitual criminal cannot stand. There is no reason to interfere with the sentence of five years' penal servitude.

Conviction as habitual criminal quashed.

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If there is any uncertainty at the trial whether the appellant is an alien the Court will hear evidence on the point.

This was an appeal against part of the sentence, namely, the recommendation for expulsion, by leave of Bray J. Appellant was convicted of larceny, at the Leeds Assizes, on the 18th of March, 1913, before Mr. Commissioner Foote, K.C., and was sentenced to twelve months' imprisonment with hard labour and recommended for expulsion.

Appellant, who was not represented by counsel, was not present.

Vernon Wragge for the Crown. Appellant was convicted at Huddersfield in January and was then recommended for expulsion. A letter was sent by the Home Secretary to the officials at Leeds Assizes stating that he was waiting to decide whether to act on that recommendation until the result of this trial was known.

[PICKFORD J.: Is it not necessary that a prisoner should be proved at the trial to be a foreigner before such a recommendation is made?]

I must admit the only evidence here was appellant's own admission that he was born in Poland, but the Commissioner acted on the Home Secretary's letter. Enquiries since made by the Metropolitan police verify appellant's statement that he is an alien.

The Court allowed evidence on the point to be called.

Detective-Sergeant Jeffrey stated that appellant's real name was Harry Coffe; his father was a Pole who came to England seventeen years ago; three years later he sent for his children, including appellant, whose age was now twenty-two.

RIDLEY J.: In this case it seems somewhat uncertain whether all the facts were before the Commissioner when he recommended the appellant for expulsion, but we have had the evidence of a

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detective, which establishes the fact that the appellant is a foreigner who has been in England since he was ten years old. The magistrates at Huddersfield appear to have recommended him already for expulsion. On the whole we think the recommendation ought to be adhered to; it is for the Home Secretary to say whether it shall be carried out. The objectionable character of the crime and the manner in which it was carried out leads us to say that we think the order ought to be made.

Appeal dismissed.

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WILLIAM PALMER.

Evidence of convictions and offences not strictly proved nor admitted must not be taken into account in sentence.
Severity of sentence.

This was an appeal against sentence by leave of Bray J. Appellant was convicted of house-breaking, at the Warwickshire Sessions, on the 17th October, 1912, and was sentenced to ten years' penal servitude.

Appellant in person. Detective Cull, of London, gave evidence that I had been convicted of breaking into twelve or thirteen houses at Acton and had made London too hot to hold me. This was untrue; I was only convicted of breaking into two places. He also said I broke out of a reformatory, but I was never in one.

Maddocks for the Crown. I have no knowledge whether Cull's statement is correct or not, but appellant did not challenge it at the trial. A Coventry policeman said that since his last release from prison, which was only a fortnight before his arrest in August, appellant had broken into houses at Nottingham and Leicester, and that prisoner desired the Court to deal with those offences: prisoner did not deny those statements.

Appellant: I admit the offences at Nottingham and Leicester, but not that I broke into twelve or thirteen houses at Acton.

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RIDLEY J.: This is an appeal against a sentence of ten years' penal servitude, passed at the Quarter Sessions at Coventry. It appears that the appellant had previously been sentenced to eight years' penal servitude in 1903, at the Middlesex Sessions, for burglary, and to eighteen months' imprisonment with hard labour for burglary in 1909. When the question of sentence was before the Court Cull gave evidence as to character; he said he had known the appellant for twelve years as a most dangerous thief; he had been sent to a reformatory and broken out of it on the same day, and had had twelve months for breaking into twelve or thirteen houses, and had made London too hot to hold him. These points were not put to the prisoner, and he was entitled to say what he could in answer to them. As the opportunity was not given him it is necessary for us to consider what on the whole merits of the case the sentence ought to be. The offence of which he was convicted was that of breaking, with another man, on the 9th September, 1912, into an unoccupied house; when people came to the house one of the men was found in bed, and the other with his pockets full of jewellery. It was a serious offence, but not one which of itself ought to receive ten years' penal servitude. It is true he had only been out of prison a very short period; still, as he had no opportunity of disputing Cull's allegations, we think a sufficient sentence would be one of five years' penal servitude.

Sentence reduced.

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The Court will not give leave to call a witness who has made a confession exonerating an appellant but who declines to swear to the truth of it unless he is guaranteed immunity for the crime.

The Court will not as a rule give leave to call a witness the nature of whose information is not disclosed.

Whether the Court will take notice of an objection that the trial judge declined to allow a witness to be treated as hostile, quære.

These were applications for leave to appeal against convictions and to call further evidence. The applications were before the

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Court on the 7th April, 1913, when an adjournment was applied for and granted. (See above, p. 237.)

Fox Davies (with him *Schultess Young*) for the appellants, who were not present The usual form giving the name of the witness it is desired to call, and the evidence he is expected to give, has not been handed to the Registrar, but the solicitor instructing me has sworn another affidavit, which will explain the reason. The witness is Joseph Thwaites, and since last week he has been convicted and sentenced, but, although he has in the presence of prison officials repeated to his solicitor his admission that he was the principal in the crime, he refused to sign a statement or give evidence to this effect unless the solicitor would give him an undertaking that he should not be tried for this crime, or have his present sentence increased. Of course, my solicitor told him he could give no such undertaking. Thwaites's name was mentioned by me at the trial as one of the men we said were really guilty, the others being Paul, Russell and Blake. I suggest that Gordon. who was only identified from a photograph, has been mistaken for Paul, whom Thwaites says was acting with him in the crime. I desire also to call Brooks, who will speak to a ride to Putney in a taxicab by some of the appellants on the day of the crime, which was committed on the south side of Blackfriars Bridge.

I called Blake as a witness at the trial, and another ground on which I wish to appeal is that the judge refused my application to be allowed to treat Blake as a hostile witness. He had signed a written confession and declined to answer questions which I put to him.

RIDLEY J.: After a long trial these four appellants were convicted of robbery with violence, and I have one general observation to make, namely, that the case is one which, as one reads it, developes largely in interest. Although it is true that the identification was not so strong as it sometimes is, it was strong enough to go to the jury, but the whole story fits in in such a way that there can be no mistake as to the men. That is the effect on me of reading the evidence. Now an application is made for leave to appeal against the convictions, and to call further evidence. Last Monday the appellants were told that the usual form must be

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filled up with the names of the witnesses they desired to call, and the evidence they were expected to give; they have not done so. To-day an affidavit is put in by the solicitor in the case mentioning one Joseph Thwaites, who is said to be a person it is desired to call to say that he committed the robbery, and that the four appellants were not there. What is the story set out in the affidavit? Although he has since last week been convicted of another offence with other prisoners, it is said that unless he is assured that making the statement will not mean that he will have to undergo a longer term of penal servitude, he will not make it. We decline to allow a person to be called on such terms. The next witness it is desired to call is one Brooks; in his case the form has been filled up with his name and address, but with no other details. The Court ought to hesitate long before acceding to an application where it is not known what the witness is to say. But it seems that his evidence would be wholly immaterial from what we understand of it. In any case, we cannot accede to this request, and so the application fails. It might be different if we were given details to shew it was a *bonâ fide* application.

Another point taken is as to the witness Blake. We are not satisfied that the ground suggested is one which it is competent for this Court to deal with; we do not decide that we cannot, but the matter is peculiarly one for the judge at the trial. We have, however, taken notice of the questions put to Blake and his answers, and we do not think there is anything to shew that he was hostile.

Application dismissed.

Solicitors for Applicants—*Engell & Crane.*

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The trial judge has a discretion, with which the Court is slow to interfere, whether he will allow cross-examination as to character under s. 1 (*f*) (ii) *of the Criminal Evidence Act*, 1898.

Hudson's *case* (7 *Cr. App. R.* 256: 1912) *followed.*

Whether evidence consistent both with the story of an accomplice-witness and of defendant is corroboration of the former, quære.

This was an appeal against conviction on grounds involving questions of law. Appellant was convicted of feloniously receiving stolen property, at the County of London Sessions, on the 13th March, 1913, and was sentenced by the Deputy-Chairman to four years' penal servitude.

St. John Hutchinson for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted with two other men on charges arising out of the theft of a piece of jade from Messrs. Liberty, Ltd. Mr. Blackmore, the secretary of Liberty's, stated that the appellant called on him on the 28th February and said that his business was to recover stolen property, that he had bigger funds at his disposal for getting information than the police, and that he was known to leading officials at Scotland Yard. He added that a piece of jade had been stolen from Liberty's on the previous evening, and offered to get it back. An arrangement was come to between them. The next morning the appellant brought the jade and was paid £6 3*s.*, the amount agreed upon; he was to be paid a further three guineas on the conviction of the thief, or on proving who he was. Before employing the appellant Mr. Blackmore communicated with the police.

My first ground of appeal is that if any offence at all was committed, it was not that of feloniously receiving stolen property. The appellant admitted that he received the jade from Barnett, one of the other prisoners, knowing that it had been stolen, but he did this as the agent for Liberty's, and, therefore, it was not felonious. It is true it was suggested that it was all a plot, and that Barnett acted as intermediary between appellant and the thieves, but there was evidence that in one case appellant had assisted to secure the conviction of a thief.

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Further, the Deputy-Chairman summed up as if the indictment was under s. 101 of the Larceny Act, 1861, which it was not.

Secondly, I complain of misdirection by the Deputy-Chairman. A witness named Childs said that the appellant had instructed him to get among "the boys," meaning the thieves, and to find out what had been stolen, and where from; that he said he could get a good deal more by taking it back to the firm it was stolen from than by selling it to ordinary receivers. The prosecution opened that Childs, being an accomplice, required corroboration, and the Deputy-Chairman, in his summing up, said that, as regards the appellant, Childs's evidence "is corroborated in important and material particulars, or, at all events, there is evidence which you are fully justified in considering corroborative." I submit that there was in fact no corroboration, and that it was improper to direct the jury that there was.

[RIDLEY J.: An accomplice may be believed without corroboration. *Thistlewood*, 33 St. Tr. 681; 1820.]

That is so in law, but the practice is that a judge ought to direct the jury to acquit the accused, if there is no corroboration. *Everest*, 2 Cr. App. R. 130; 73 J. P. 269 (1909). The appellant in fact told Liberty's that one Cohen was the thief and Barnett his informant, which is strong evidence that the receiving was not felonious; there was only the evidence of Childs to suggest that it was.

Thirdly, I submit that the appellant was improperly cross-examined as to character, and that the judge was wrong in holding that this was admissible after the cross-examination of Childs by the appellant, who conducted his own defence. Childs having said that the appellant had employed him, was asked whether he had not represented that his father was in Childs's Bank, and that his sister was Lady Hamilton; the judge asked him what these and other questions had to do with the case, and he answered, "I want to shew that this man came to me and told me his affairs, and I introduced him to Mr. Speed as a client, and I did not take him into my employment." Later on he asked whether Childs had not sent him threatening letters, and although on cross-examination the appellant was led to say that he charged Childs with sending him blackmailing letters, his

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questions were put not to shew that Childs was a man who ought not to be believed, but that he was not the sort of man he would have taken into his confidence or have employed. Where the cross-examination is not made with a view to discrediting the testimony of a witness, it does not let in evidence as to the prisoner's character. *Preston*, [1909] 1 K. B. 568; 2 Cr. App. R. 24; 78 L. J. K. B. 335; 100 L. T. 303; 73 J. P. 173; 53 S. J. 322; 25 T. L. R. 280; 21 Cox C. C. 773. *Bridgewater*, [1905] 1 K. B. 131; 74 L. J. K. B. 35; 91 L. T. 838; 53 W. R. 415; 69 J. P. 26; 20 Cox C. C. 737; 21 T. L. R. 69; C. C. R., where the defence raised is much the same as that raised in the present case, is also in my favour.

[AVORY J.: Those two cases were considered by a special Court in *Hudson*, (1912) 2 K. B. 464; 7 Cr. App. R. 256; 81 L. J. K. B. 861; 107 L. T. 31; 76 J. P. 421; 56 S. J. 574; 28 T. L. R. 459, where it was held that the words of s. 1 (f) (ii) of the Criminal Evidence Act, 1898, must receive their ordinary and natural interpretation, and not be qualified by adding such words as "for purposes other than that of developing the defence."]

Hudson does not in terms override *Preston*, and this case is nearer *Preston* than *Hudson*. If the rule is made too narrow it will render it difficult for a prisoner with a bad record to make a defence; it ought only to apply where the character of a witness is attacked merely to shew that he is unreliable.

Huntley Jenkins, for the Crown, was called on only as to the last point. The appellant almost from his first question to Childs made imputations on his character, and so rendered himself liable to be cross-examined as to his own character under the Criminal Evidence Act, 1898. It was quite unnecessary for him to cross-examine Childs as to credit, because in my opening I had cautioned the jury against accepting Childs's evidence unless it was corroborated, on the ground mainly that he was an accomplice, but I think also on the ground of his general bad character. I did this because there had been a previous trial of these prisoners at which the appellant had cross-examined Childs to character, and Childs in his answer had attacked the appellant's character. The Chairman thereupon discharged the jury, and put back the

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trial to the next sessions. The appellant raised the issue clearly before the jury by asking Childs, "I put it to you that your evidence about being in my employment is absolutely false?"; further questions were unnecessary, but he shortly afterwards suggested that Childs had sent him threatening letters, which could only have been meant to discredit his evidence; it had no bearing on the question of employment. The words of the section are very clear, and witnesses for the prosecution must be protected against such attacks. A prisoner with a bad character must put up with the fact that he cannot safely make attacks on the character of a witness for any reason. After the judge had allowed the appellant to be cross-examined to character, he asked him whether he wished to put further questions to Childs, but he did not do so; for this reason the jury did not know that Childs had been previously convicted.

[AVORY J.: May not the words of the statute mean imputations on the character of a witness whose character has not already been attacked by the prosecution as it had been here?]

The appellant should have been satisfied with the fact that Childs was acknowledged to be an accomplice, and not have tried to discredit him further.

PICKFORD J.: This case is a difficult one, and the Court has had considerable trouble over two points. Three main points have been taken; first, that the Deputy-Chairman misdirected the jury by not putting the real issue to them. The Court is of opinion that his direction to a certain extent is not very clear. He seems, in some parts, to put the question as if the indictment was drawn under s. 101 of the Larceny Act, 1861. The charge was one of feloniously receiving stolen property, and the question really was whether in receiving the property knowing it to have been stolen, as the appellant did on his own statement, he did so honestly for the purpose of restoring the property to its owners and convicting the thief, or dishonestly for his private advantage for the purpose of getting a reward from the owners instead of selling it. That was the issue, but the Chairman seems to have put it to the jury as being whether the appellant came within the proviso of s. 101 of the Larceny Act, "unless he shall have used

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all due diligence to cause the offender to be brought to trial." That confusion was introduced by the appellant himself; the direction was inaccurate, but in substance it really represented the state of things; if the appellant came within the proviso he received the property honestly, so the misdirection seems to the Court not to have been of real importance; in substance the real question was put to the jury, so they were not misled.

The second point is that the Deputy-Chairman misdirected the jury by telling them that there was corroboration of Childs's evidence when in fact there was not. Childs gave evidence against both Barnett and the appellant; there was certainly corroboration as to Barnett, but whether there was as to the appellant is a different matter. The corroboration suggested is that Childs having alleged that he was employed by the appellant to go among the thieves and get stolen property in order that the appellant should take it to the owners who would give him as a reward a larger sum than could be got by selling it, the owners shewed that the appellant did in fact come to them, bring them the property and receive a reward. That was said by the Deputy-Chairman to be corroboration, but it seems to us it was not. It was consistent with the story either of the appellant or of Childs. But in a recent case in this Court, *Wilson, Lewis and Havard,* 6 Cr. App. R. 125 (1911), when the point was taken that there was no sufficient corroboration, because there was no evidence which shewed the guilt of the prisoner; the Court decided that there was corroboration. In the course of the case, Avory J. said, "If the jury find part of an accomplice's story corroborated, they are entitled to believe the whole." That was only a remark in the course of the argument, and would not have the same force as a judgment, but in his judgment the Lord Chief Justice said, "It must not be supposed that corroboration is required amounting to independent evidence implicating the accused," and he quoted the words of Maule J. in *Mullins,* 3 Cox C. C. 526 (1848), "Confirmation does not mean that there should be independent evidence of what the accomplice relates, or his testimony would be unnecessary." That authority seems to shew that corroboration generally that the story is true is sufficient. It is not necessary to decide the question in this case, because the judge pointed out that the jury, if not satisfied with the corroboration, would have to strike out Childs's evidence. In the opinion of the

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Court there was ample evidence on which the jury could have acted apart from the evidence of Childs, so there was no miscarriage of justice on this point.

That leaves only the question whether the appellant was improperly cross-examined to character, and that is the point that has given the Court the greatest amount of trouble. It arises under s. 1 (f) of the Criminal Evidence Act, 1898. (His Lordship read the section.) That section has given rise to difficulties in many cases. It has been held that to say that a witness for the prosecution was telling lies is not an imputation within the meaning of the section. There have also been observations in some cases that seem to imply that where the cross-examination is only a necessary part of the defence it is not within the section. Those cases were considered by this Court in *Hudson*, and the matter was considered so important that it was ordered to be re-argued before a Court of five judges. This was done, and the remarks to which I have referred were certainly held not to be of general application. The judgment ended with these words: "We think that the words of the section, 'Unless . . . . the nature or conduct of the defence is such as to involve imputations,' &c., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily' or 'unjustifiably' or 'for purposes other than that of developing the defence,' or other similar words." That is a considered judgment and that is the principle we have to apply.

In this case Childs was called as a witness for the prosecution, and the jury were properly told by counsel for the prosecution that his evidence required corroboration; he certainly told them that the reason was that Childs was an accomplice, and may have also told them that his character was bad, though of this he is not quite so certain. Childs was not cross-examined as to his convictions but was as to other matters. It was contended that the cross-examination did not involve imputations on his character but was directed to elicit facts to shew that Childs was not an accomplice of the appellant and was not in his service. It has been pointed out that to apply the rule strictly is to put a hardship on a prisoner with a bad character. That may be so, but it does not follow that a judge necessarily allows the prisoner to be cross-examined to character; he has a discretion not to allow it, and the prisoner has that protection. But in order to see if the conviction should be

quashed it is not enough that the Court should think it would have exercised its discretion differently. It is necessary to shew that in law the cross-examination of the prisoner was inadmissible. The judge at the trial is in a better position to judge whether the cross-examination should be allowed. The foundation on which it was admitted was the cross-examination of Childs to the effect that he had made misrepresentations as to the position of his family in order to ingratiate himself with the appellant and had written threatening letters to him.

That cross-examination seems to cast imputations on the character of Childs, because it suggests that he had told false stories about his relations for the purpose of his own advantage, and also had sent the appellant threatening letters. The Court does not attach so much importance to the way the matter was developed in cross-examination of the appellant, because it ought to consider what he meant at the time and not the motive that was thrust upon him by cross-examination. This was an imputation on Childs's character, but two or three answers are suggested to the Court. First, it is said that this was not really a cross-examination to credit, but was only eliciting necessary facts to rebut the suggestion made by the prosecution that Childs was an accomplice working with the appellant, and was in his service. It does not seem possible to confine it in this way. It was not necessary to cross-examine Childs as to false statements about his family, nor probably as to his having sent threatening letters, though this is not so clear. The general conclusion of the Court is that the appellant was not satisfied with the statement made that Childs was an accomplice, and possibly also that he was a man of bad character, but wished to elicit more in order that the jury should not accept his evidence. These were imputations within the meaning of the section. The appellant did not cross-examine Childs as to his previous convictions; that may be because he was under the impression that the section only applied to cross-examination as to previous convictions, and that any questions that did not go so far did not amount to imputations. The questions put seem to the Court to bring the case within the meaning of the section, and therefore the Court is not able to say that the evidence is illegally admitted. It is not a question for the Court whether it would have exercised its discretion in the same way. It might have worked a considerable injustice, for, while the jury learnt the full bad his-

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tory of the appellant, they only learnt a portion of the bad history of Childs. The Deputy-Chairman saw the possibility of this because, after the cross-examination of the appellant, he had Childs recalled and gave him an opportunity, when it could do him no further harm, of cross-examining him in any way he wished. The appellant, however, thought it better to stand on his rights and continue to assert that he had been improperly cross-examined, and said he did not wish to ask anything else and that he had never intended to make imputations on Childs's character. That may be so, but the question is what in fact he did. The Court is of opinion that none of the grounds on which the appeal is based have been sufficiently established, and therefore the conviction must stand.

Avory J. points out that another ground on which the cross-examination might be upheld, though it is not one which has been put forward, is a question put by the appellant to Mr. Blackmore—"I gave you references as you have mentioned. I said, 'You do not know me, but I am an enquiry agent, and you are at liberty to refer to Chief Inspector Bower or to Vine Street'?"

"Yes."

"I stayed in your office while you rang up these people?"

"That is right."

That seems to come within the earlier part of the sub-section as being a question asked with a view to establish his own good character. On that ground also the cross-examination might be admissible.

Appeal dismissed.

A. L. B. T.

ARTHUR FLATMAN.

Joint possession must not be presumed; an omission to deal with the law on the point may be a misdirection resulting in a miscarriage of justice.

This was an appeal against conviction and sentence by leave of Bray J. Appellant was convicted of feloniously receiving stolen property, at the County of London Sessions, on the 19th

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March, 1913, and was sentenced by the Deputy-Chairman to six months' imprisonment with hard labour.

The evidence for the prosecution was that on the 24th February a spirit case containing a cut-glass decanter was stolen from a messenger boy in the employ of Messrs. Ropley & Co. The firm shortly afterwards issued an advertisement and received communications on the telephone, in consequence of which they sent a cabinet maker in their employ named Day, on the 28th February, to the Free Library in South Audley Street, where the appellant came up to him and said: "If you come along with me I will tell you where you can get the box," and asked if he had 5*l.*; Day answered that he had. They walked along the streets and met a man named Johnson, who was tried and convicted with the appellant. They walked to an underground lavatory in Barrett Street; Johnson left them for a moment on the way and rejoined them with the stolen case, which he gave to Day, and asked for the 5*l.*, on which Day called up a detective who had been following them. Johnson ran away, but was caught by the detective, and the appellant went into the lavatory, but was detained by Day.

Appellant in person. I was not identified by the messenger boy as one of the men who stole the case from him, and according to Day's own evidence I never had it in my possession. These points were never put to the jury by the Chairman in his summing up.

[RIDLEY J.: The question is whether you were acting in concert with Johnson.]

Moseley for the Crown. It was Johnson who had the physical possession of the case, but the defence at the trial was directed not to the question of possession, but to whether the appellant knew that it had been stolen. In any case it is not necessary that both prisoners should have physical possession; they can both be convicted if they were acting in concert. *Payne*, 3 Cr. App. R. 259 (1909).

[AVORY J.: This question was never left to the jury; they were told that the prisoners were in possession of the box.]

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Payne is also an authority that a technical objection of this nature ought to be taken at the trial. Johnson had possession of the case, and when he handed it over to Day did so on his own behalf and as agent for the appellant

Appellant in reply.

AVORY J.: In this case the question which ought to have been left to the jury was whether the appellant was ever himself in possession, or the appellant and Johnson in joint possession, of the stolen case. There was evidence on which the jury might have come to this conclusion, but it is impossible for the Court to say that they must have come to this conclusion, as the prisoners might never have been in possession of it until Johnson produced it near the lavatory. It is possible that the jury might have found that at the moment when Johnson handed the box to Day, both prisoners were in joint possession of it; but they were never asked this question. The Deputy-Chairman opened his summing up by saying, "The charge which you have to consider against these men is whether they received this box well knowing it to have been stolen, that they were in possession of stolen property does not admit of argument or dispute." The conviction must be quashed on the ground that the question was never left to the jury, as it ought to have been. As there are other indictments against the appellant, he must remain in custody to be tried on them.

Conviction quashed.

A. L. B. T.

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ARCHIBALD BROWNHILL.

The Court will not set aside a jury's finding of fact except on the strongest grounds.

This was an appeal against conviction on a reference by the Home Secretary. Appellant was convicted of libel, at the Warwick Assizes, on the 13th November, 1912, before Scrutton J., and was sentenced to two years' imprisonment and ordered to pay the costs of the prosecution.

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Joy for the appellant, who was present. This matter comes before the Court under s. 19 (a) of the Criminal Appeal Act, under which the Home Secretary can refer to the Court a petition for the exercise of His Majesty's mercy. The appellant was convicted of publishing nineteen defamatory libels, and was sentenced to six months' imprisonment in respect of the first of them, and to one month's imprisonment in respect of each of the others, to run consecutively, making two years in all; he was also ordered to pay the costs of the prosecution. The case has already been before the Court on the 20th December, 1912, when an application for leave to appeal against conviction was refused. (See above, p. 118, where the date of conviction is wrongly stated as in 1911 (13th November), instead of in 1912.) There is now the gravest reason for supposing that the wrong man has been convicted. The prosecutor in the case was Alderman Evans, a well-known man who lived at Sutton Coldfield. In 1909 a series of postcards and letters of a filthy and scurrilous nature began to pour in on him and his family, many of them having reference to his daughter Alice; at that time Evans said he hardly knew the appellant, had never spoken to him, and there was no quarrel between them. On the 1st November, 1910, two brothers named Martin were charged with sending these libels, and were committed for trial; the evidence against them was based mainly on similarities of handwriting and internal evidence, references in the libels to matters known to the Martins; one theme in those letters was the engagement of Alice Evans. The Martins were tried on the 10th March, 1911, at Warwick Assizes, and acquitted; the appellant was a witness for the prosecution in that case; he had himself received anonymous letters of the same character, one of which contained a threat to shoot him; he took it to Evans, who advised him to go to the police.

After the trial cards of a similar nature continued to be sent to the Evans; they were practically all written in capital printing characters, and most of them were signed "The Spotter." The incidents in the early cards had nothing to do with the appellant, who had been headmaster of a school at Sutton Coldfield for seventeen years, and had always borne an excellent character. On the 5th February, 1912, the appellant was served with four summonses in respect of these libels, and on the day before they were returnable he disappeared; a warrant for his arrest was

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issued on the 13th February, but it was not until the 11th July that he was found near Huddersfield and arrested, having tried to alter his appearance by growing a beard. I admit that this was a strong piece of evidence against him, but his explanation was that he heard that it had cost the Martins 800*l.* to defend themselves, that he had no money available, but thought that if he went away and the cards continued to arrive it would prove that he was innocent. In fact cards did not come then, but on his arrest they started again, many of them written with a view of shewing that the appellant was innocent, and saying that although the writer had endeavoured to throw suspicion on the appellant, he had not thought it would go as far as a prosecution. Since the appellant's conviction letters and cards have been received by his solicitor and other people, which I submit are in the same writing as those used in the Martins' trial and in the appellant's, which shews that he could not have written any of them. Two of these letters have been received by the Home Secretary himself, and are set out with others in the reference to this Court. The first of these letters bears the postmark, "Leeds, 2.45 p.m., Dec. 10, 12," and is as follows:—

Sutton Libel Case.

Dr. Sir,

In justification to Mr. Brownhill, of Sutton Coldfield, the schoolmaster who has been convicted of sending cards and letters to the Evans family, I wish to make the following statement. I am the sole author of all cards and letters, and since Mr. Brownhill's conviction I have sent upwards of eighty letters in my endeavour to shew my guilt, and if others were not implicated I should have given myself up in Mr. Brownhill's place. I have an old grievance against W. H. Evans, and he knows what it is; I shall continue sending until he owns himself in the wrong; never was a man more wrongly convicted than this man Brownhill, and I hope you will see into it for his sake. All cards sent to the Evans family are true, and not untrue. He is a bad man. I wish to state that I impersonated Mr. Brownhill on many occasions, never thinking that the police would be bribed by Mr. Evans, which I swear they have been, to say they saw Mr. Brownhill, well knowing it was not him, on many

occasions. This I swear to be true, and hope you will look into it.

The Spotter.

The second letter bears the postmark "Droylsden, Manchester, 8.30 p.m., Ja. 29, 13"; it is to the same effect, and suggests that a handwriting expert should be asked to compare the letter with those used at the trial. Many other letters received since the trial have been submitted to an expert and compared by him with some received before the trial, and I ask leave to call him to give evidence. The fact that libellous letters were being received while the appellant was in custody awaiting his trial, was before the Court at the application for leave to appeal; it was also before the jury at the trial; the judge suggested they were being sent by someone prepared to assist the defence, and he used this view formidably against the appellant. The question whether the letters were genuine "Spotter" letters was never gone into; no handwriting expert was called at the trial.

The evidence for the prosecution was based largely on the fact that the libels contained allusions to matters within the appellant's knowledge, and the judge in his summing up referred to "watermarks on paper, stamps, formation of letters used, peculiar words, using information which could have only come from one particular source," and enlarged on these points which all were directed to shew that the appellant was the actual writer of the letters. There was also evidence that on twelve occasions he had been seen to post letters in boxes which, on being cleared, were found to contain "Spotter" letters, and that when he did not go out no postcards came. If, as is suggested, the writer was trying to put suspicion on the appellant, as he had previously put it on the Martins, this is not surprising. In his second letter to the Home Secretary "Spotter" says: "I followed police on nearly every occasion. They followed Brownhill."

In suggesting that the cards written while the appellant was in custody were written by his relatives the judge was usurping the functions of the jury, and going beyond what was laid down as the proper functions of a judge by Lord James of Hereford in *Clouston & Co., Ltd.* v. *Corry*, (1906) A. C. 122; 75 L. J. P. C. 20; 93 L. T. 706; 54 W. R. 382; 22 T. L. R. 107. Other points in the evidence to which the judge drew the attention

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of the jury were that when the post office, with the appellant's authority, stopped and handed over to the police cards, &c. addressed in pencil they began to come in ink, and on the police being told to stop those in ink they came with type-written addresses. There was evidence that the appellant posted letters in many different pillar boxes, but all these were on the way to Birmingham, and as he often went there on his bicycle, it was easy for any one to know his habits and to post in the same boxes. In some cases when a "Spotter" letter was found in a box where the appellant had been seen to post something, legitimate letters written by him were also found. A great point was made of a letter which was found upon him on arrest which was signed Bluit, which was admitted to mean his brother, and which contained the sentence: "Respecting the four, were they all to the old cock himself?" in two postcards Evans had been addressed as "Old cock." The appellant's explanation was that they were breeders of carrier pigeons, and his brother was inquiring whether four pigeons were the children of a particular old cock. These points are not sufficient to justify the conviction being upheld if all the cards and letters are in the same handwriting.

The Court gave leave for evidence to be called.

Dr. Walter de Gray Birch, called and examined by *Joy,* said: I have studied comparisons in handwriting for upwards of forty-five years, and have often given evidence on the subject. On the 13th March, 1913, I reported on various letters which had been submitted to me by the appellant's solicitor. I compared five letters bearing postmarks of dates since the trial with three addressed to the appellant in 1911, and the photograph of a post-card which was an exhibit in the trial of the Martins. I am of opinion that they are all in the same handwriting. I base this opinion on the following similarities; there is the letter A with an open top in all the letters, though it is found also with closed tops.

I is found with two horizontal bars, Y with a long down stroke and a short stroke meeting it from the left hand side: H with the horizontal bar running out beyond the upright on the right; G in

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two forms, one with a long straight tail, and the other with an additional horizontal bar; M with sloping line on the left shorter than that on the right.

Cross-examined by *Hollis Walker, K.C.*, for the Crown: None of the exhibits in the trial were submitted to me. In the documents which I compared all the letters are capital printing letters. In one of the "Spotter" letters to Brownhill in 1911 there is a B which is not in printed form; it is very like the B in the appellant's signature; I would not say strikingly like, nor that it is certainly in the same handwriting. Four of the envelopes of the letters submitted to me are, I think, by a different hand.

By the Court: I have not been asked to compare the appellant's writing with that of the other documents, nor have I made any report on this point.

William Harold Kimpton, called and examined by *Joy:* I am a solicitor and have acted for the appellant in this matter. I have received twenty-four letters since the trial, the latest having been received on the 4th April; I have made a careful study of them; apart from the peculiarities spoken to by Dr. Birch, there are similarities in the letters "S," "C" and "R." These peculiarities run all through the letters used in the Martins' case, in the appellant's case, and received since his conviction. I sent Dr. Birch a specimen of the appellant's writing and asked him to compare it with the other letters; later, at his request, I sent him other letters written by the appellant.

Cross-examined: My comparison of the letters received since conviction with those exhibited in the Court below was made in the short period when the documents were in my hands as they passed between the bench and the bar during the argument.

Joy: I ask the Court to compare some of the exhibits in the Martins' case with these letters and to note the similarities.

[The Court declined, but whether because they were not evidence

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in this trial (*a*), or because the Court did not "think it necessary," did not appear: the Court referred to s. 19 (a) of the Criminal Appeal Act.]

The Home Secretary directed that these letters should be sent to the Court in case it desired to compare them. In *Thomas Smith*, 3 Cr. App. R. 87; 74 J. P. 54 (1909), the Court made a comparison of handwritings, and on the opinion so formed quashed the conviction. If the Court do so now, a great similarity will be found between all the letters and postcards; if they are all from one source it admittedly cannot be the appellant. It is true he was charged with publishing the libels, but nothing has been produced to shew his connection with those before the Martins' trial, and it is hardly conceivable that there were two separate libellers, one at work from 1909 to 1910, and the other from 1910 to 1912. The summing up turned almost entirely on matters which went to shew that the appellant wrote the libels, and no one can say that the jury would necessarily have come to the same conclusion without the evidence that he wrote them. It is far from certain that the right man has been convicted; the fact that the evidence brought against the Martins was almost of exactly the same character must not be lost sight of.

Hollis Walker, K.C. (with him *J. G. Hurst*), for the Crown. On this charge it is sufficient if the complicity of the appellant in the composition, publishing, or writing the libels is proved. The strongest evidence had reference to the publishing, but there was evidence on the other points as well. The judge began his summing up by stating that the appellant was charged with uttering the libels. Now it is suggested that if certain fresh material had been before the jury it would have turned the scale in the appellant's favour, but whether the recent "Spotter" letters were written by the appellant or not is really not relevant. The prosecution never suggested that he wrote the letters and postcards which were used in the Martin case, nor is it part of their case that he has been unaided in the matter. The recent

(*a*) S. 9 (a) of the Criminal Appeal Act, 1907, is: "For the purposes of this Act, the Court of Criminal Appeal may, if they think it necessary or expedient in the interest of justice, order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case."

letters have not been compared with any which were exhibits in this case, and the evidence at most comes to this, that someone who is still at large wrote some of the letters which came in 1911. Dr. Birch's examination was not adequate, for he never compared the writing in the cards with the appellant's, though I was able to point out a similarity in the letter "B."

The theory of the prosecution is that some friend of the appellant's has written these letters, and, therefore, it would be natural that he should copy the writing to be found in the previous postcards. The similarities suggested are inconclusive and slight, and quite insufficient to displace the strong evidence given at the trial. I rely strongly on the appellant's flight and on the fact that on his arrest letters found on him shewed that he was corresponding with his relatives by means of a code. A key was also found upon him which he said opened a drawer in his bedroom where he kept his papers; the police took the key, but when they got to the house found the drawer broken open and the papers in ashes in a grate. His relatives were clearly helping him then, and the inference is that they are attempting to do so now.

Joy: The case at the trial was that the appellant was the writer; it was never suggested that he was the mere distributer, nor did the judge suggest to the jury that they should find whether he either wrote or published the libels. It was impossible for Dr. Birch to compare the recent cards with the actual exhibits in this case as they were in the custody of the Court, but I ask this Court to compare the documents. If there is a chance that the appellant has been wrongly convicted, it is a case in which the Court ought to interfere in the interests of justice.

PICKFORD J.: This case is a remarkable one, and it also comes before the Court in a remarkable manner. The appellant was tried on an indictment charging him with uttering libels on Alderman Evans, of Sutton Coldfield. The libels were part of a series of what the judge who tried the case characterised as a persecution which had continued for a very long time. The defendant was a man of good position, the master of a school, and

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apparently on very good terms with the Evans family. The jury convicted him, and the case put was no doubt that he was the writer of the libels, though there was evidence that he published them, even if he did not write them. He was sentenced to two years' imprisonment by Scrutton J., and appealed to this Court against his conviction. In the application for leave to appeal, which was heard on the 20th December, 1912, these grounds were raised: (1) That the verdict was unreasonable and against the weight of the evidence; (2) That certain material facts beneficial to the defence were withheld by the judge from the jury; (3) That the judge never alluded to the motive for committing the offence nor the character of the person charged; and also that since the appellant's conviction other communications which were called "Spotter" letters, from the word of their signature, had been circulated. All these matters were before the Court on that occasion. It is admitted by Mr. Joy that there were strong facts in evidence at the trial pointing to the guilt of the appellant. It is not necessary to go through the facts of the case before the time of the reference by the Home Secretary, because all the points were dealt with by the Court in December, and without saying that there is no case in which on the same materials the Court would reconsider its decision, it would only do so in exceptional circumstances. After that appeal communications continued to come to different people signed by "The Spotter," chiefly to persons interested in the defence, such as the appellant's solicitor; but some to other persons. The Home Secretary, after considering the report of Dr. Birch, an expert in handwriting, and a letter written to him by the appellant's solicitor, referred the matter to the Court, and it comes before us on that new evidence. It must be noticed that the fact that further communications were being received was before the Court on the previous appeal. The additional facts now are that "The Spotter" continues to send these communications, and Dr. Birch's report that in his opinion the "Spotter" communications sent after the appellant's conviction are in the same handwriting as one at least of the libels on the Evans family received in 1909, and for the publication of which the Martins were charged and acquitted. The argument is that this evidence ought to satisfy the Court that the "Spotter" communications received since the appellant's conviction are written by the same person as the Martin libels, and also, though

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Dr. Birch has not had an opportunity of examining the documents, as the communications as to which the appellant was charged, and that that should satisfy the Court that the latter libels could not have been written by the appellant.

The first step in this argument is that the Court must be satisfied, by evidence put before it, that the subsequent letters are in the same writing as those written before the trial. Dr. Birch gives various reasons for thinking so. Nearly all the communications are in printing characters, but some of the addresses are written. It is not necessary in the opinion of the Court to go through all the peculiarities pointed out by Dr. Birch. It is noticeable that in his opinion in the subsequent "Spotter" letters two hands were at work; the printing is in the same hand, but the written addresses are by some one else. But he has pointed out various coincidences running through the whole series of letters, and no doubt the recent communications, those used in the Martins' trial, and those received after that trial and before the appellant's arrest, do present strong similarities and coincidences. But it does not seem to the Court that these similarities and coincidences prove conclusively that all the documents were written by the same person. The communications are in printing characters, and many of these similarities are such as would naturally be expected of anyone using such characters. It must not be lost sight of that the person who published the subsequent "Spotter" letters would have an opportunity of knowing how the previous letters were written and of copying them. Therefore the first step fails; the Court does not consider Dr. Birch's evidence sufficiently strong to establish that all the documents were written by the same person.

Reference has been made to the letters exhibited in the appellant's trial: the Court has examined them and there are similarities between them and the recent communications; an examination of the Martin libel submitted to Dr. Birch shews that they are less like this than they are like one another. It is to be noticed that although Dr. Birch had a specimen of the appellant's admitted handwriting and asked for earlier specimens to compare with the other documents, he did not report to the appellant's solicitor with regard to this matter, nor has he said to us that the libellous documents are not in the appellant's hand-

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ARTHUR BROWNHILL.

Pickford J.

writing. Why he did not compare them and why he did not report on the point it is difficult to say. Without relying on it too far it is certainly remarkable that having got a specimen of the appellant's handwriting, and his case being that none of them were written by him, Dr. Birch never expressed the opinion that the Martin letter was not written by the appellant, and when shewn one or two of the libels was forced to confess that the letter "B" in them, the letter which the appellant is most accustomed to write, as being the initial letter of his name, was very like that found in his genuine handwriting. Dr. Birch did not say whether the libels exhibited at the trial and shewn to him to-day were written by the appellant, on a comparison of the writings, but would not express an opinion; his answers, however, and the manner in which he gave them leads the Court to think that he did think they were in the same writing. On these facts it is impossible for the Court to say that here is new matter sufficient to displace the verdict found by the jury, and to justify us in interfering with the conviction.

It may be asked why and how these communications have been sent. It is enough to say that certainly there were people assisting the appellant at the time when he absconded. A letter from his brother was found on him which evidently pointed to the fact that his family were anxious, perhaps not unnaturally, to assist him. The communication bears on its face strong evidence that the brothers were communicating with regard to the libels, and concerting a way of getting out. It is not disputed that "M. P." in this letter referred to Evans, and there is the sentence, "Respecting the four, were they all to the old cock himself?" Some considerable discussion took place at the trial as to the meaning of this sentence; the appellant said that it referred to a cock pigeon, but the jury did not think much of this explanation, a fact which does not seem surprising to the Court. There were, therefore, persons doing their best to help the appellant; it is sufficient to say that there may be other friends, or the same, who think that a way of helping him now is to send communications of this kind; it is not necessary for the Court to decide whether that is so or not. The only decision of the Court is that the evidence before it to-day does not justify it in departing from the decision come to in December last, and in quashing the conviction. It is a serious matter, and one where the Court

would have been glad to see a man who had previously borne a good character cleared, but the Court does not see its way to do so.

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Pickford J.

Appeal dismissed.

Solicitor for the Appellant—*W. H. Kimpton*, Birmingham.

Solicitors for the Crown—*Glaisyer, Porter & Co.*, Birmingham.

A. L. B. T.

SIDNEY GRUNSPAN.

22 *April.*

Severity of sentence—Expulsion of an alien.

This was an appeal against conviction on a point of law, and an application to appeal against conviction on fact and against sentence. Appellant was convicted of fraudulent conversion, at the Central Criminal Court, on the 2nd April, 1913, before Mr. Commissioner Rentoul, and was sentenced to twelve months' imprisonment with hard labour and recommended for expulsion.

R. D. Muir for the appellant, who was present. The appellant was indicted for misappropriating a cheque for 171*l.*, dated July 5th, 1911, and its proceeds and 29*l.* in money, and under another count for obtaining the same by false pretences; a general verdict of "Guilty" was returned. The prosecutrix was a Mrs. Faulder, who alleged that the 200*l.* had been entrusted to the appellant for investment on her behalf in Shirvanski shares; he said the money had been handed to him as a loan; there was a direct conflict of evidence on this point. Included in the 29*l.* was a 10*l.* banknote which, according to the evidence, was paid out by Cox's bank in exchange for a cheque, and was paid into the credit of the appellant on the 3rd July, If the date on the cheque was correct, the story could not be accurate. The evidence of the prosecutrix and a Miss Jeffs also varied at different stages of the proceedings. I must admit that the question was one for the jury, and they may possibly have

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believed the ladies story though thinking them mistaken as to the date.

At the trial I objected to the admission of certain evidence, but the judge ruled that it was admissible; the prosecution, however, did not proceed further with it, and therefore I cannot base any appeal on this ground. The application for leave to appeal was drawn up by the appellant, and he included this point of law as one of the grounds of appeal.

As to sentence; this was the first offence of the appellant here or elsewhere. He has lived with his parents, brothers, and sisters in Hampstead for twelve years, and they have all made England their home; they are Russians from Warsaw. The parents are old and unable to travel abroad; if the appellant is expelled from this country it will mean that he will be permanently separated from them.

[AVORY J.: There was evidence that the elder brother passed as Seymour and pretended not to know the appellant, who passed as Green.]

That is so; his character as regards business was no doubt unsatisfactory, but it all had reference to the purchase of shares, so it was really all one offence.

R. Oliver for the Crown. The only additional fact the Court ought to know is that in July, 1912, the appellant became bankrupt, his liabilities being 1,370*l.* and assets *nil*. The prosecutrix would wish the Court, if possible, to deal leniently with him.

AVORY J.: The Court finds no reason for interfering with the conviction in this case; the question which story was true was entirely one for the jury; it was properly left to them and they decided, as probably we should have decided, that the story of the ladies was the truth. As to the sentence, twelve months' imprisonment with hard labour is certainly not, in the opinion of the Court, excessive; it is the kind of fraud which requires severe punishment, and one which is frequently committed by designing men on unsuspicious women. The Court would not in the ordinary course, interfere with the order recommending

the appellant for expulsion, which is a matter for the discretion of the Home Secretary, but we are asked on behalf of the prosecutrix to extend some mercy to him, and for that reason we are justified in saying that so much of the sentence as refers to the recommendation for expulsion shall be annulled.

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CRES —

AVORY J.

Sentence varied by setting aside recommendation for expulsion.

Solicitors for the Appellant—*Osborn & Osborn.*

A. L. B. T.

BEFORE

MR. JUSTICE RIDLEY, MR. JUSTICE PICKFORD, AND MR. JUSTICE AVORY.

FREDERICK CHARLES WESTWOOD.

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There is a presumption that the notice to "the proper officer of the Court" of an intention to charge a prisoner as a habitual criminal (under s. 10 (4) (*b*) *of the Prevention of Crime Act,* 1908) *has been duly given: the onus is on the prisoner of shewing that it has not.*

Previous convictions other than the three in the statutory notice to the prisoner may be proved less strictly than these: Franklin (3 *Cr. App. R.* 48, 1909) *followed.*

Where there is no "miscarriage of justice," the Court may disregard the admission of evidence of the "other grounds" of which notice ought to have been given.

This was an appeal against sentence, and an application for leave to appeal against convictions. Appellant was convicted of forgery, on the 10th March, 1913, and of being a habitual criminal, on the 11th March, 1913, at the Central Criminal Court, before the Common Serjeant, and was sentenced to five years' penal servitude, and five years' preventive detention.

A. S. Comyns Carr for the appellant, who was present. In this case, although there was undoubtedly a considerable amount of admissible evidence against the appellant on both charges, the case was so overlaid with irrelevant and inadmissible evidence that, in my submission, the convictions cannot stand. On the charge of forgery the evidence for the prosecution was as follows: a firm of solicitors, Pettitt & Valentine, had an office at 27, Chancery Lane, and on the 24th December, 1912, the office was closed, and a cheque book and some cheques which had been paid and returned by the bank were left in a drawer in the office. On the

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30th December the firm received a communication from their bank, which was the London City and Midland Bank, Fleet Street, and found that the cheque book and cheques were missing. On the 28th December a forged cheque for 75*l.* was presented at that bank signed in the name of the firm, and made payable to C. E. Philpot, and three notes for 20*l.* each and 15*l.* in gold was paid out in exchange for it. The firm had a client of the name of Philpot, but with different initials. Two of the 20*l.* notes reached the Bank of England, and there was no evidence with regard to them except the fact that they were endorsed "C. E. Philpot." The third note was cashed by a tobacconist named Dunslow through his bank for the appellant on the 30th December; the appellant who bought some cigars on that occasion arranged to call back a fortnight later for more cigars; he did so, and it was this which led to his arrest. The fact that he returned after cashing the note is a strong point in his favour. From the moment of his arrest the appellant admitted the transaction with Dunslow, and said he could explain it; he told the police he got the note from a stockbroker; it is true he gave no explanation at the trial, but this may be explained by the fact that he was undefended and did not give evidence.

No one else identified the appellant as being connected with the forgery. The bank clerk who cashed the cheque, when he was put up among others for identification, picked out the wrong man; as the appellant is deformed and limps he would be an easy person to identify. There was evidence of handwriting given, and evidence that his financial position was better after the date of the crime than before.

The appellant was a man with a bad record, and my main ground of appeal is that, although evidence of previous convictions was not given, the case was so conducted as to make it manifest to the jury that he was a man of bad character who had been convicted before. Two letters which he had written in prison were exhibited for the purpose of the evidence as to handwriting, and although he had written numbers of letters, the two selected bore references which made it clear that he had been in prison before.

[*Cassie Holden,* for the Crown. These letters were never before the jury; only individual words or parts of words were photographed for the purpose of the evidence.]

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I was not at the trial, and the jury had a right to see the exhibits if they wished. Another letter which was found on him on arrest referred in terms to a previous conviction.

[*Cassie Holden:* Only the first two lines of the letter were read.]

Inspector Hine on being asked by the appellant in cross-examination whether Mr. Haworth, the writer of a letter to appellant, was not a clergyman, replied: "Yes, a clergyman at Wormwood Scrubbs Prison." On his arrest the appellant had been asked questions as to where he had been working, and he mentioned one Radley. Radley, a man of bad character, was called for the prosecution, and of course could not be cross-examined to character. The appellant called a man named Gill, who was cross-examined by the Crown as to character, although their own witness was just as bad. From all this the jury would have realised that the appellant and his associates were men of bad character.

An attaché case was found at the appellant's house, and it was suggested that it had been stolen from the same office as the cheques; the prosecutor, however, said that he thought it was not his, and that his case was much newer. After that, I submit, further evidence on the subject was inadmissible, but evidence was given, mainly of a hearsay character, to shew that the explanation given by the appellant how he became possessed of it, was untrue. No notice of this evidence was served on the appellant, nor did it appear on the depositions. Evidence of the result of enquiries made by the police, except answers to enquiries made at the request of the prisoner, is inadmissible. *Gray,* 6 Cr. App. R. 242 (1911); *Campbell,* 8 Cr. App. R. 75 (1912).

In the trial on the charge of being a habitual criminal, many irregularities occurred. No evidence was given of the notice to the Court of the intention to proceed on this charge; in *Turner,* 3 Cr. App. R. 103; [1910] 1 K. B. 346; 79 L. J. K. B. 176; 102 L. T. 367; 74 J. P. 81; 54 S. J. 164; 26 T. L. R. 162, it was decided that some evidence on the point must be given; the subsequent case of *Waller,* 3 Cr. App. R. 213; [1910] 1 K. B. 364; 79 L. J. K. B. 184; 102 L. T. 400; 74 J. P. 81; 54 S. J. 164; 26 T. L. R. 142, only shews that the consent of the

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Director of Public Prosecutions need not be proved unless the objection is taken.

[AVORY J.: The reasons given in the judgment in that case cover this point. It is presumed that the Clerk of Assize has satisfied himself that the conditions of the statute have been complied with until the contrary is proved.]

The notice served on the appellant under the Prevention of Crime Act, 1908, besides alleging the three statutory convictions, gave the following "grounds":—(2) "That having been discharged from prison on the 7th day of July, 1912, on the 23rd day of December, 1912, you committed the first of the crimes for which you are now awaiting your trial." No exception can be taken to this. (3) "That on the 5th November, 1912, an office situate in Palmerston House, Old Broad Street, E.C., was entered by means of a skeleton key, and a clock and a set of drawing instruments were feloniously stolen from the office, and that on the day of your arrest a pawnticket relating to the stolen property and a skeleton key, with which the office door could have been opened, were found in your possession." Clauses (4) and (5) contained allegations of a similar character. These must mean that the appellant stole or feloniously received the property, and if the prosecution intend to charge a prisoner with having committed specific felonies which are not admitted, they must be tried on indictment, and not dealt with in this way.

[PICKFORD J.: As evidence of character and repute may be given, the result, if your argument is right, is that evidence may be called to prove a prisoner is a reputed thief, but not to prove that he is an actual thief.]

The appellant should have first been tried on these charges, and then the convictions could have been proved.

A number of matters were given in evidence which were not justified by the notice; such as that he obtained situations by false references, that he stole and forged cheques in 1902 for which he was never prosecuted; that shortly afterwards he went to a hotel at St. Ives, where he paid for his food and lodging with a worthless cheque; that he was charged with various offences

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in the West of England for which he was tried and acquitted; that the Church Army, after trying to help him, had refused to have anything further to do with him, and that he had ill-treated his wife. Not only was this evidence not justified by the notice, but most of it was hearsay.

[AVORY J.: Most of this was the result of enquiries made at firms whose names he had given, and in answer to an implied request for enquiries. If the answers had been satisfactory they could have been given in evidence, so why may they not if they are unsatisfactory?]

The appellant never asked for enquiries to be made; he was questioned by the police on arrest, and said he would rather not give any information until a solicitor was present. A detective said that every prisoner is asked to supply the names of employers for whom he has been working.

This operates harshly against a prisoner; if he refuses to give such information it can be inserted in the notice as one of the grounds on which he is charged with being a habitual criminal. Even if the appellant gave the names to the police, it cannot make hearsay evidence admissible; that it is not referred to in the notice only makes it worse.

While the statutory convictions were properly proved, the seven other convictions were only proved by hearsay evidence. Although *Franklin,* 3 Cr. App. R. 48 (1909), and *Chatway and Howard,* 5 Cr. App. R. 151 (1910), seem to justify this, *Stewart,* 4 Cr. App. R. 175; 74 J. P. 246 (1910), and *Culliford,* 6 Cr. App. R. 142; 75 J. P. 232 (1911), are to the contrary effect. I ask the Court to review these cases, which are inconsistent.

Cassie Holden, for the Crown (who was confined to the point whether the evidence given on the charge of being a habitual criminal was inadmissible, either as being hearsay or as not being justified by the statutory notice). Much of the evidence to which objection has been taken was evidence of the offences for which the appellant had been convicted on previous occasions; these convictions are specified in the notice, and it is not necessary also to specify the facts which led to the convictions. Other parts of

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evidence were the result of enquiries at addresses given by the appellant.

If a prisoner answers questions asking where he has been employed, it must be taken as a request to find out all about him; if anything to his credit were found out it would be most improper of the police to keep it back. With regard to the employment by Mr. Box, where the appellant committed forgery but was not prosecuted, he himself gave the address, and a letter written by him and admitting his guilt was produced. Some parts of the evidence such as the offence of which he was acquitted cannot be said to have been justified, but no harm was done to the appellant by such evidence. (He was stopped by the Court, who expressed the opinion that there had been no miscarriage of justice.)

Comyns Carr: There was no evidence before the jury that the offences of which evidence was given were the same as those for which convictions were proved; the jury probably thought that these offences were in addition to those for which he had been convicted. Evidence of so many matters outside the notice was given that the appellant must have been prejudiced. There is nothing in the Prevention of Crime Act, 1908, to justify hearsay evidence of the nature given; under s. 10 (2) it is expressly provided that "A person shall not be found to be a habitual criminal unless the jury finds *on evidence*" that he has been three times previously convicted and is leading persistently a dishonest or criminal life. Under s. 10 (5), evidence of character and repute may be given, but these words do not admit of hearsay evidence of matters of fact; only of general character and repute. *Mawson* v. *Hartsink*, 4 Esp. 102; 6 R. R. 841 (1802).

The sentence of five years' penal servitude was excessive; the appellant is only thirty years old, and it has been laid down by this Court that where a prisoner is young and is sentenced to preventive detention, it is desirable that it should commence at the earliest moment allowed by the statute. *Taylor and Coney*, 5 Cr App. R. 168 (1910).

RIDLEY J.: In this case counsel contends that the appellant is entitled to have the convictions, both for forgery and as a habitual criminal, quashed. He was tried before the Common Serjeant for forging a cheque for 75*l.*, and the case made against him was

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that he possessed a key by means of which he opened the door of the office of a firm of solicitors, abstracted a cheque book, forged a cheque, and cashed it on the 28th December, 1912. He received in exchange three notes for 20*l.* each and 15*l.* in gold. His actual identity as the man who cashed the cheque was not proved, but one of the three notes received was presented by him to a tobacconist. All this evidence was before the jury and other evidence besides. The appellant was asked to explain how he came to have possession of the note, but no explanation was given which could have been satisfactory to the jury; he told the police that he got it from a stockbroker, but he gave no name, and the explanation is not a satisfactory one. On all the evidence there was sufficient to entitle the jury to convict, but certain points have been taken by counsel which in our opinion have no weight in this case. The first had reference to a letter written by the appellant which was used by a witness to shew that the handwriting on the cheque and banknote was similar to that of the appellant, and it is contended that the letter contained expressions which shewed that he had been previously convicted, and was therefore prejudicial to him. It turns out that the letter was not before the jury at all, and that the witness only used a photograph of certain letters in it, and therefore that objection fails.

A similar objection was taken to another letter which contained a similar reference, but the letter was not read in Court beyond the first two lines; it was also suggested that the letter was not evidence at all, but it was relevant to explain the date on which a certain ten shillings had been returned by the appellant, so there is no reason to object to this evidence. There were other points taken, but none of importance. The attaché case was not mentioned in the summing up, and no weight was attached to it by the Common Serjeant. The conviction for forgery was therefore a proper one.

Now as to the conviction as a habitual criminal. In our opinion the notice to the Court of the intention to insert such a charge is one which is assumed to have been sent to the Clerk of Assize unless it is challenged. Unless such a notice has been given the proceedings cannot be instituted, but in practice it is generally assumed that the bill would not have been sent to the grand jury unless this provision had been complied with.

Objection has been taken to evidence that went to shew that

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between the appellant's release from prison in July, 1912, and December, he committed other crimes for which he had not been prosecuted. The jury must find on evidence that he was leading persistently a dishonest or criminal life, and the Act also stipulates that notice must be given to the offender, specifying the previous convictions and other grounds on which it is intended to insert such a charge. It seems to us that the notice could properly include such things as were included in clauses (3), (4) and (5), on the ground that they are evidence that the appellant had been leading a dishonest or criminal life, having been connected with a series of transactions which pointed to that fact, although without leading to actual convictions. The evidence was not given under s. 10 (5) as evidence of general character, but under s. 10 (2) to prove that he was leading a dishonest or criminal life. That objection is thus disposed of, but it is true that beyond the things referred to in the notice certain other matters were given in evidence which ought to have been included in the notice to the prisoner and were not included. If these matters were so material that the jury would be likely to have been influenced by them, it would be necessary to consider them, but it seems to us they were not so. Being asked by the police whether he had been employed the appellant gave certain names; a detective made enquiries and gave evidence as to the answers he had received, some of which referred to other crimes committed by the prisoner, for some of which he had been convicted. In one case, that of Mr. Box, he had not been prosecuted, but had written a letter admitting the crime, so no harm was done by this evidence. It would be otherwise if a detective gave answers which were entirely hearsay and of which there was no other evidence. It is difficult to say exactly what would be outside the limit, but it is easy to say what is within it. A detective has a right to say that he was referred to such a person and made enquiries. Again, he may say that he found the prisoner had not been employed there at all; employment is the very question on which the names are submitted to the detective. It is not necessary to go further into that matter.

There is one other point. A number of convictions were mentioned besides the three statutory convictions, and as is usually done they were read off a list by the detective. The question was raised whether these convictions can be given in evidence without

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strict proof by some one who was present at the convictions. *Franklin's* case shews that they can. It must be remembered that they were not any of the three capital convictions, and the detective could be cross-examined if their correctness is disputed. The evidence is not improperly given when a detective reads the list as part of his own enquiries. The appellant's case was not prejudiced, and even if there is anything in the points raised, in the opinion of the Court there was no miscarriage of justice, and therefore the conviction must be confirmed.

On the question of sentence we are not quite sure that we would have given five years' penal servitude and five years preventive detention, but it is difficult in cases where that is done to say that the Court ought to interfere. It ought not to do so unless the judge has gone beyond what is a just sentence. It is difficult to say that the appellant did not deserve this sentence; he had already had a sentence of five years' penal servitude; he had a bad record, and this was a bad crime. The Court therefore cannot reduce the sentence.

Appeal dismissed.

Solicitors for the Appellant—*Carter and Bell.*

A. L. B. T.

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